81-2110

No.

Office - Supreme Court, U.S.
FILED
MAY 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

On Appeal From the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER, SIMONOFF AND ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

QUESTION PRESENTED

Whether a municipal ordinance, which requires that at least 40 per cent of all employees hired by private contractors engaged in public works construction projects for the municipality be persons who have been municipal residents for a year prior to employment, violates the Privileges and Immunities Clause, Commerce Clause, or Equal Protection Clause of the United States Constitution?

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MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

The United Building and Construction Trades Council of Camden County and Vicinity, the appellant, appeals from that portion of the final judgment of the Supreme Court of New Jersey, dated February 18, 1982, upholding the validity, under the United States Constitution, of a municipal ordinance passed by the City of Camden, and approved by the State of New Jersey, which requires that at least 40 per cent of the employees hired by private contractors engaged in public works construc-

tion projects for the city be municipal residents for one year prior to employment.[1] This Jurisdictional Statement is submitted to demonstrate that the United States Supreme Court has jurisdiction of this appeal and that a substantial question is presented warranting plenary review.

OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N. J. 317 (1982), and is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and this Jurisdictional Statement was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(2). See *Erznoznik v. City of Jacksonville*, 422 U. S. 205, 207 n.3 (1975).[2]

---

1. In the same opinion, the New Jersey Supreme Court also upheld a challenge to the Camden City ordinance which established a 25 per cent minority hiring goal for private contractors engaged in public works construction projects for the city. The appellant is not appealing that portion of the lower court's decision.

2. Appellant believes that the jurisdiction of this Court is properly invoked under 28 U. S. C. § 1257(2). However, if this Court does not agree, Appellant respectfully requests that its Jurisdictional Statement be treated as a Petition for a Writ of Certiorari to the New Jersey Supreme Court.

CONSTITUTIONAL PROVISIONS, ORDINANCE AND STATUTE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

"The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Article I, § 8, cl. 3:

"The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Fourteenth Amendment, § 1:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutional review is sought is set forth in its entirety as Appendix C. In relevant part, it provides as follows:

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.[3]
>
> C. *Developer/Contractor's Contracting Obligations.*
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event,

3. App. 54-55.

shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.[4]

I. *Definitions.*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence.[5]

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5.[6]

4. App. 56.

5. App. 38.

6. App. 62.

STATEMENT OF THE CASE

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as the "Council") seeks to appeal from a judgment of the Supreme Court of New Jersey (App. 1-32), upholding the constitutionality of a Camden City resident preference ordinance, which requires that at least 40 per cent of the workers hired by private contractors engaged in public works construction contracts for the City be municipal residents for one year prior to employment.

The Council is a non-profit association of labor organizations which represent employees in the building and construction trades in Camden, Burlington, Gloucester, Salem and Cumberland Counties in New Jersey. Employees who are members of the Unions which comprise the Council include persons who reside in the City of Camden, persons who reside in New Jersey but outside the City of Camden and persons who reside outside the State of New Jersey.[7] These individuals are employed by various construction contractors who work in all counties where the Council has territorial jurisdiction and who have performed and will continue to seek to perform work on construction projects in the City of Camden. Many are "steady hands" who regularly work for such contractors and move with them from project to project, and many perform extremely specialized tasks.

The 1975 amendments to the New Jersey Law Against Discrimination sought to establish a comprehensive affirmative action program in the awarding of public works contracts. *L.* 1975, C. 127, N. J. S. A. 10:5-31 to 38. Pur-

7. Due to its location on the Delaware River, immediately across from Philadelphia, Pennsylvania, Camden, New Jersey is readily accessible to residents of both Pennsylvania and Delaware.

suant to this statute, a prospective public works contractor is required to formulate and submit for approval to the New Jersey Department of the Treasury "his or its affirmative action program whereby he or it guarantees minorities employment in all employment categories* * *." N. J. S. A. 10:5-34. No public works contract can be awarded by the state, county, municipality or other political subdivision nor any monies paid thereunder to any prospective contractor "who has not agreed and guaranteed to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N. J. S. A. 10:5-32.

As an alternative to State approval of all affirmative action plans submitted by prospective public works contractors, the statute authorizes state and local agencies to devise their own particular affirmative action programs and submit them for approval by the State Treasurer. N. J. S. A. 10:5-36(c). The New Jersey Department of the Treasury established by regulation a procedure whereby any municipality or public agency may have its affirmative action construction programs so approved. N. J. A. C. 17:27-6.5. State approval of such programs supersedes the otherwise applicable statutory requirements with respect to the submission of affirmative action plans by prospective contractors on all public works contracts.[8] Thus, prospective contractors for public works contracts from a public agency with a state-approved affirmative action construction program need not have their own individual affirmative action programs approved by the State Treasurer on a contract-by-contract basis, and need only

8. Thus N. J. A .C. 17:27-6.5(a) provides that "an approved public agency program" shall exclusively establish the state affirmative action procedures and requirements which implement P. L. 1975, C. 127 * * * as applied to construction contracts and subcontractors involving said public agency."

comply with the requirements of the public agency's state-approved program.[9]

On July 24, 1980, the City of Camden, New Jersey adopted "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf of the City of Camden,"[10] and an amended ordinance was enacted on August 28, 1980.[11] The stated purpose of these ordinances was to relieve unemployment, particularly among minority residents in the City,[12] and the ordinances were designed to permit Camden to substitute its affirmative action program for the state mandate normally imposed on individual public works contractors.

The Camden ordinances provide in pertinent part, that "any party performing or offering to perform a con-

9. In determining whether or not a public agency's affirmative action program will be approved, the State Treasury Department is guided by N. J. A. C. 17:27-6.5(b), which sets forth the minimum requirements for state approval. (App. 62). These criteria are a requirement that the public agency's construction contracts include certain mandatory contract language, a requirement that the public agency's bid advertisements state that bidders must comply with the affirmative action statute, and a requirement that the public agency's minority employment percentage goal not be less than that set by the Treasury Department in N. J. A. C. 17:27-7.3 for the county in which the construction project is located. There is nothing in the state statute or regulations promulgated by the State Treasurer which provides for employment preference by private contractors based upon residency.

10. App. 36-53. Initially passed on July 24, 1980, the ordinance was not formally adopted by the City Council until its second reading on August 28, 1980.

11. App. 54-58. Similarly, the amended ordinance passed on August 28, 1980, was not formally adopted by the Council until its second reading on September 11, 1980.

12. App. 36-37.

tract for public construction in the City of Camden" (Article I, § 1, Definitions of "Developer/Contractor")[13] "in hiring for jobs, shall make every effort to employ persons residing in the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden" (Amended Article IV, § b).[14] The ordinance applies "[W]herever the City of Camden spends funds derived *from any public source* for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00 . . ."[15] (emphasis added). The term "resident of the City of Camden" is defined as follows:

> * * * any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [Article I, § 5].[16]

Taken together, these provisions dictate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions *solely* on

13. App. 37.

14. App. 56.

15. App. 54-55. As written, the ordinance appears to apply to many more projects than merely public works construction projects. Indeed, the ordinance states that "[t]he provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more."

16. App. 38.

the basis of an applicant's place and duration of residency, regardless of the individual's qualifications or unemployment status. The ordinance compels private developers and construction contractors to have no less than 40% of their workforce on any particular city construction project consist of people who have lived in Camden for at least one year and have expressed an intention to make the City their permanent place of residence. Thus, job preference must be afforded a Camden resident over an out-of-state resident, regardless of whether the latter is unemployed, is a member of a minority group, or possesses more skills for the requisite job. Similarly, a long-term Camden resident is preferred over a new arrival, solely on the basis of length of residence within the municipality. The ordinance applies to the expenditure of funds for construction projects from any public source, which includes both federal and state dollars, as well as revenue generated by Camden taxpayers.

Subsequent to its passage, the City submitted its ordinance to the Chief Affirmative Actions Officer of the New Jersey Treasury Department for approval.[17] On November 24, 1980 the Chief Affirmative Action Officer, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5, approved the Camden ordinances and designated the Affirmative Action Program of the City of Camden as a state approved affirmative action construction program.[18] As a result of this approval, all prospective private contractors engaged in City construction projects are required to comply with Camden's resident preference requirements.

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17. App. 59.

18. App. 60. Other than the exchange of correspondence and the submission of the ordinance, there were no other administrative proceedings prior to the approval of the ordinance. The appellant did not participate in any fashion in this administrative process, nor was it or any other party afforded an opportunity to do so.

The Council filed a timely notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of the action taken by the Chief Affirmative Action Officer and the constitutionality of the Camden ordinance.[19] On June 19, 1981, the New Jersey Supreme Court accepted this appeal by direct certification pursuant to New Jersey Court Rule 2:12-1, and subsequently upheld the constitutionality of the Camden resident preference against attack on federal constitutional grounds.

Although the Court recognized that the Camden ordinance involved "the imposition of hiring quotas upon private contractors", whereas previous decisions in the area have applied solely to municipal employees, the Court did not believe that this distinction deprived the ordinance of its constitutional validity, either under the Privileges and Immunities Clause, Commerce Clause or Equal Protection Clause of the United States Constitution.[20]

MEANING OF THE DECISION BELOW

In interpreting the holding of this Court that the purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States so far as the advantages resulting from citizenship in those States are concerned," *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978), the New Jersey Supreme Court concluded that the Clause may not be invoked to strike down purely local ordinances that discriminate on the basis of municipal, rather than state residency.[21] The Court reasoned that since the local ordi-

19. The Appellant in this appeal is solely concerned with the constitutionality of the Camden resident preference ordinance and is not raising any challenges as to the administrative process or to the authority of the State to approve this ordinance.

20. App. 21.

21. App. 26.

nance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents," [22] the resident preference cannot be said to be aimed primarily at out-of-state residents and thus does not violate any privilege of state citizenship.

In so holding, the New Jersey Supreme Court has redefined the Privileges and Immunities Clause to apply solely to actions of a state itself and immunizes discriminatory treatment of out-of-state residents, so long as some in-state residents also suffer adverse consequences.[23] The lower court ignored the fact that merely because the Camden resident preference ordinance may also affect other New Jersey residents, this in itself does not mitigate the burden imposed on out-of-state residents, nor does it minimize the benefits reaped by Camden residents at the expense of nonresidents.

The Court also held that the Camden ordinance was not invalid under the Commerce Clause.[24] The Court recognized that the Supreme Court of the United States has often invoked the Commerce Clause to "strike down

22. There was no evidence in the record nor did the New Jersey Supreme Court point to any to justify its determination that the Camden residency requirement affects more New Jersey residents not living in Camden than it does out-of-state residents.

23. The New Jersey Supreme Court acknowledged that New Jersey's mandatory preference for State citizens in public works contracts, N. J. S. A. 34:9-2, was held violative of the Privileges and Immunities Clause in *Neshaminy Constructors, Inc. v. Krause*, 181 N. J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981), but failed to recognize the implication of that holding in light of its decision in the case *sub judice*. App. 26. Thus, as the law now stands in New Jersey, the State of New Jersey violates the Privileges and Immunities Clause by requiring private contractors to hire State residents on public works construction projects, but it is permissible for a political subdivision of the State of New Jersey, a municipality, to establish a local residency requirement.

24. App. 22-25.

state legislation that unreasonably impedes the flow of commerce across state lines,"[25] or applied the clause "to municipal enactments that unreasonably burdened interstate commerce."[26] However, the Court held that all of the leading Commerce Clause cases involved "state taxes and regulatory measures impeding *private* trade in the national marketplace," whereas in the case *sub judice*, "the City of Camden is not regulating the flow of commerce between private parties . . . [but] acting in the role of market participant."[27] As such, the City's conduct was held immune from Commerce Clause scrutiny. The court felt that in enacting its resident preference ordinance, the City was merely deciding to favor its own citizens and choosing the parties with whom it will deal, conduct which both that court,[28] and this Court, have upheld.[29]

However, the court overlooked the fact that in conditioning the awarding of public works contracts upon the hiring of Camden residents by private contractors, the City was not only deciding with whom it would deal, but dictating, pursuant to a scheme of state regulation, the hiring decisions of private employers. Thus, the City was using the public fisc to regulate the private market.

The Court recognized the recent decision of the Supreme Judicial Court of Massachusetts invalidating resident hiring quotas for private contractors engaged in Boston public works projects. *Mass. Council of Construction Employers, Inc. v. Mayor of Boston*, — Mass. —, 425 N. E. 2d 346 (1981), *cert. granted sub nom. White v. Mass. Council of Construction Employees*, — U. S. —,

25. *See, e.g., Toomer v. Witsell*, 334 U. S. 385 (1948).

26. *Dean Milk Co. v. City of Madison*, 340 U. S. 349 (1951).

27. App. 22.

28. *See K. S. B. Tech. Sales Corp. v. North Jersey District Water Supply*, 75 N. J. 272, 381 A. 2d 774 (1977).

29. *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980).

102 S. Ct. 1273 (No. 81-1003, 1982). However, the New Jersey court distinguished the holding of *Mass. Council of Construction Employers, supra,* on the grounds that the Massachusetts court relied almost exclusively on *Hicklin v. Orbeck, supra,* in which the state was acting as a market regulator, whereas Camden in enacting its resident hiring quota herein, was acting as a market participant.[30]

Nor did the New Jersey Supreme Court find the Camden ordinance to be violative of the Equal Protection Clause.[31] Recognizing that residency requirements for municipal employees have "almost universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare",[32] the Court concluded that a resident hiring preference does not violate any fundamental right to interstate travel and is rationally related to furthering the city's interests. In so holding, the New Jersey Supreme Court completely ignored that while the courts have sustained *continuing* residency requirements for municipal employees, statutes involving a *durational* residency requirements have been consistently struck down. None of the cases cited by the lower court are applicable to the Camden ordinance, which mandates job preferences in the private construction industry based on length of residence within the City.

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30. App. 24-25.

31. App. 27-28.

32. *E.g., McCarthy v. Philadelphia Civil Service Comm'n,* 424 U. S. 645 (1976) (per curiam).

THE FEDERAL QUESTION SUBMITTED IS SUBSTANTIAL

I. The Camden Resident Hiring Quota Violates the Privileges and Immunities Clause.

A. A Local Ordinance Which Discriminates Against Out-of-State Residents Is Not Immune From Review Under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State, or Because It Burdens Some In-State as Well as All Out-of-State Residents.

In holding that the Privileges and Immunities Clause of Article IV, § 2, Cl. 1 of the United States Constitution is inapplicable to the Camden resident preference quota, the New Jersey Supreme Court reasoned that since the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents . . . it does not violate any privilege of state citizenship", and is therefore immune from constitutional review under the Privileges and Immunities Clause.[33] Such a holding undermines the vision and purpose behind the Privileges and Immunities Clause, destroys the Clause's significance, and would result in economic Balkanization and parochial retaliation becoming the predictable order of the day, as the political subdivisions of the several States eagerly seek to accomplish the discrimination forbidden to the States themselves.

The Privileges and Immunities Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U. S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's residents."

33. App. 26.

Hicklin v. Orbeck, supra, 437 U. S. at 523-24.[34] The purpose of the Clause, as described in *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 180 (1869) is

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

The Clause was designed both to place some constraints on states' freedom to discriminate against nonresidents as well as to foster national unity:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice was to help fuse into one nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy . . . 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of

34. As this Court stressed in *Hicklin v. Orbeck, supra,* 437 U. S. at 524, n. 8: "[a]lthough this Court has not always equated state residency with state citizenship . . . it is now established that the terms 'citizen' and 'resident' are 'essentially interchangeable . . .' for purposes of analysis of most cases under the Privileges and Immunities Clause of Act IV, § 2." (citations omitted).

> those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' (citation omitted).

Toomer v. Witsell, supra, 334 U. S. at 395-96.[35]

35. Although not extensive, the available evidence of the Framers' intent in drafting the Privileges and Immunities Clause indicates that the clause at least was designed to minimize friction among the people of the various states and between the states themselves. G. Stimson, "Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV," 128 UNIV. OF PA. L. REV. 379, 383 (1979). The clause is derived from the fourth article of the Articles of Confederation which provided:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . ."

JOURNALS OF THE CONTINENTAL CONGRESS 214-15 (G. Hunt ed. 1912). Finding that the discrimination at which this clause was aimed was not eradicated during the period of the confederation, "the provision was carried over into the comity article of the constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation." *Austin v. State of New Hampshire, supra,* 420 U. S. at 660-61 (citations omitted). Charles Pinckney of South Carolina, the recognized author of the Privileges and Immunities Clause, *Id.*, 420 U. S. at 661, n. 6, assured the Constitutional Convention that the clause is "formed exactly upon the principles of the 4th article of the present confederation . . ." 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (1911). Moreover, Alexander Hamilton stressed that the Privileges and Immunities Clause "may be esteemed the basis of the Union." THE FEDERALIST No. 80, at 497 (H. Lodge ed. 1888).

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin v. New Hampshire, supra,* 420 U. S. at 662. Thus, this Court has consistently struck down state statutes as violative of the Privileges and Immunities Clause which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency. *See e.g., Ward v. Maryland,* 79 U. S. (12 Wall.) 418 (1871) (Maryland statute regulating sale of goods in City of Baltimore violated the Privileges and Immunities Clause by requiring nonresident merchants to obtain licenses to practice their trade without requiring the same of similarly situated Maryland merchants, charging nonresidents higher license fees than Maryland merchants, and prohibiting merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the City); *Toomer v. Witsell, supra* (invalidating a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially); *Mullaney v. Anderson,* 342 U. S. 415 (1952) (striking down a plan employed by the Territory of Alaska for the licensing of commercial fisherman which charged non-residents ten times more for licenses than residents); *Doe v. Bolton,* 410 U. S. 179 (1973) (holding that a state criminal abortion statute which prohibits all abortions, except those performed on bona fide state residents, violates the Privileges and Immunities Clause by denying medical services to out of state residents); *Austin v. New Hampshire, supra* (State commuter income tax falling exclusively on incomes of non-residents and not offset by other taxes imposed on residents alone held violative of Privileges and Immunities Clause); *Hicklin v. Orbeck, supra* (Alaskan statute which required that all contracts in connection with the con-

struction of Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to non-residents held violative of the Privileges and Immunities Clause in that it unreasonably discriminated against citizens of other states).

Although the contours of the Privileges and Immunities Clause are not well developed, *Baldwin v. Fish and Game Commission of Montana*, 436 U. S. 371, 380 (1978), and this Court has yet to determine the full range of activities subject to review, *Id.* at 388, it is now beyond dispute that Article IV, § 2 plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation. *Ward v. Maryland, supra.* Indeed, this Court has consistently recognized that the right to engage in "common callings." *Toomer v. Witsell, supra*, 334 U. S. at 403, and to pursue "ordinary livelihoods" *Id.* at 408 (Frankfurter, J. concurring) is worthy of the safeguards of the Privileges and Immunities Clause, and state and federal courts have regularly struck down laws which interfere with an individual's right to engage in his chosen occupation solely because of residency.[36]

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36. Thus, laws have been struck down which interfere with an out-of-state resident's right to engage in commercial fishing, *see e.g., Toomer v. Witsell, supra, Mullaney v. Anderson, supra, Brown v. Anderson*, 202 F. Supp. 96 (D. Alaska 1962), *Gospodonovich v. Clements*, 108 F. Supp. 234 (E. D. La. 1951), *app. dismissed*, 344 U. S. 911 (1953); *Edwards v. Leaver*, 102 F. Supp. 698 (D. R. I. 1952); marketing of produce, *Ward v. Maryland, supra;* employment on oil and gas pipelines, *Hicklin v. Orbeck, supra;* ferry boat engineer officer, *District No. 1 Pacific Coast District, M. E. B. A. v. Ward*, 505 F. Supp. 98 (W. D. Wash. 1981) and public works construction, *Salla v. County of Monroe*, 48 N. Y. 2d 514, 399 N. E. 2d 909, 423 N. Y. S. 2d 878 (1979), *cert. denied sub nom. Abrams v. Salla*, 446 U. S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause, supra.* Indeed, since this

In the case *sub judice*, the City of Camden is seeking to condition employment with private contractors engaged in public works construction projects upon location and length of residency. Under the terms of the ordinance, out-of-state residents will be absolutely barred from at least 40% of the employment opportunities on public construction projects in the City. Surely, access to private employment is the kind of "privilege" and "immunity" which "bear[s] upon the vitality of the Nation as a single entity . . ." and the distinction imposed by the City is of kind which hinders "the formation, the purpose, or the development of a single Union . . ." *Baldwin v. Fish and Game Commission of Montana, supra*, 436 U. S. at 383, warranting careful scrutiny under the Privileges and Immunities Clause.

It is well established that what would be unconstitutional if done directly by the State can no more readily

36. (Cont'd.)

court's holding in *Hicklin v. Orbeck*, the Privileges and Immunities Clause has been employed successfully to strike down residency requirements that discriminate against out-of-state applicants for admission to the bar. *See e.g., Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D. S. D. 1982) (requirement that applicant for admission to practice law in South Dakota must be State resident violates Privileges and Immunities Clause); *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N. D. Ala. 1981) (Alabama rule requiring applica[redacted]be bona fide resident at the time of certification to sit for the bar examination contravenes Privileges and Immunities Clause); *Sheley v. Alaska Bar Association*, 620 P. 2d 640 (Alaska 1980) (invalidates rule which requires applicants to establish domicile in Alaska at least 30 days before the bar examination); *Gordon v. Committee on Character and Fitness*, 48 N. Y. 2d 266, 397 N. E. 2d 1309, 422 N. Y. S. 2d 641 (197[illegible]) (strikes down New York rule as violative of the Privileges and Immunities Clause which requires proof of state residency for at least six months prior to submission of application for admission to the bar).

be accomplished by a political subdivision at the State's direction. *See, Memorial Hospital v. Maricopa County*, 415 U. S. 250, 256 (1974). Indeed, a municipality is a creature of the state legislature and has no greater powers than those exercised by the state:

> [M]unicipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.

The City of Trenton v. New Jersey, 262 U. S. 182, 187 (1923).[37] Recently, courts both in New Jersey and elsewhere have struck down as violative of the Privileges and Immunities Clause state statutes which granted an ab-

37. *Cf., Borough of Sayre v. Phillips*, 148 Pa. St. 482, 24 Atl. 76 (1892), where in striking down an ordinance which exempts borough residents from its peddling licensing requirements, the Pennsylvania Supreme Court stressed:

> "When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character . . . It can have no better right to adopt discriminating trade regulations than the state has."

The New Jersey Supreme Court has consistently recognized the limited nature of the power of the State's municipalities. *See e.g., Dome Realty, Inc. v. City of Paterson*, 83 N. J. 212, 225, 416 A. 2d 334, 341 (1980); *Ringlieb v. Parsippany-Troy Hills Tp.*, 59 N. J. 348, 283 A. 2d 97 (1971); *Moyant v. Borough of Paramus*, 30 N. J. 528, 535, 154 A. 2d 9, 12 (1959).

solute job preference to state residents on all public works construction projects.[38] Thus, the New Jersey Supreme Court's ruling in the case *sub judice* permits Camden to engage in the very type of discriminatory activity which is proscribed for the State.[39]

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38. *See Neshaminy Constructors, Inc. v. Krause, supra; Salla v. County of Monroe, supra; Mass. Council of Construction Employers v. Mayor of Boston, supra.* In *Mass. Council of Construction Employers*, Massachusetts has not appealed that portion of the opinion which invalidated the state public works construction resident preference. *But see, People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N. E. 2d 469 (1975) where the Illinois Supreme Court held that a one year state residency requirement for preference on public works construction projects violates the Equal Protection Clause, but a mere preference for Illinois residents is not violative of the Privileges and Immunities Clause. The case was decided prior to this Court's holding in *Hicklin v. Orbeck, supra*, and its continuing validity is open to question.

39. Ironically, N. J. S. A. 34:9-2, the State resident preference statute struck down in *Neshaminy Constructors, Inc. v. Krause, supra*, applies to the construction of any public work for the state, municipality or any subdivision thereof. Thus, the statute reads in pertinent part:

> "In the construction of any public work for the state, or any county, city, town, township or borough, or other municipal corporation or any board, committee, commission or officer thereof, whether the same be a building, excavation, sewer, or drainage construction, road building, paving, bridge, or any other form or kind of public work, preference in employment thereon shall be given to citizens of the state of New Jersey who have resided and maintained domiciles within the state for a period of not less than one year immediately prior to such employment . . ."

Although the New Jersey Supreme Court acknowledges the holding of *Neshaminy* (App. 26, n. 8), there is no indication that its holding is being overturned *sub silentio*. Thus, as the law now

By construing the Privileges and Immunities Clause to have so narrow a reach as to apply only to action taken directly by a State itself, the New Jersey Supreme Court has enacted a loophole so large that it will swallow up the entire Clause. Under the lower court's interpretation, a state may circumvent the sanctions of the Privileges and Immunities Clause merely by directing each locality to undertake the very kind of discriminatory conduct which the State itself is prohibited from engaging in directly.

We have not located a single authority which has held a local ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, the Privileges and Immunities Clause has invalidated local ordinances, regardless of the fact that such ordinances may have also burdened other in-state residents.[40] Thus, almost a cen-

39. (Cont'd.)

exists in New Jersey, it is unlawful for a municipality to require private contractors to prefer New Jersey residents but permissible for it to require contractors to prefer municipal residents.

40. *See e.g., Ward v. Maryland, supra; Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance fixing higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (held that ordinance imposing higher licensing fees on non-county residents is invalid under the Privileges and Immunity Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives non-residents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182 Pa. St. 630, 38 Atl. 358 (1897) (license fee which exempts peddlers residing in the county violates the constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only

tury ago, the Kentucky Supreme Court, in striking down a municipal ordinance which imposed a higher licensing tax on non-city residents, rejected the argument that a local ordinance is valid if it burdens some state residents as well:

> The ordinance under which this payment was exacted applies to the resident of the State as well as the non-resident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed, and the fact that its provisions apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it.

Fecheimer v. City of Louisville, 84 Ky. 306, 309, 2 S. W. 65, 66 (1886).

Moreover, in an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison, supra*, 340 U. S. at 354, n. 4, that it is "immaterial" that the Madison ordinance subjected some intra-state concerns to the same discriminatory treatment as firms from out of state.[41] The critical element in finding

40. (Cont'd.)

to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *cf., Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents is held to be unconstitutional).

41. *Cf., Brimmer v. Rebman*, 138 U. S. 78, 82-3 (1891); *Minnesota v. Barber*, 136 U. S. 313, 328 (1890) ("A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.").

impermissible discrimination in *Dean Milk* and in the case at bar is that in both instances there are out-of-state residents who are subjected to discrimination, by being denied access to a local market, and selected local concerns that are the beneficiaries of this discrimination. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden, that some New Jersey residents are also burdened. To allow a state or municipality to immunize discriminatory conduct merely because the law or ordinance disadvantages some local residents would render the Privileges and Immunities Clause a meaningless enactment.

Permitting Camden to penalize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution was designed to eliminate. *Austin v. State of New Hampshire, supra,* 420 U. S. at 667. Rather than encouraging economic welfare, the Camden resident hiring quota will merely foster internecine economic warfare, resulting in the kind of Balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal. Where a classification, such as that herein, utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privilege and Immunities Clause, and is not exempt from constitutional review merely because some in-state residents are also disadvantaged.

B. The Camden Ordinance Is Invalid, as There Is no Proof That Non-Residents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed, and That the Discrimination Practiced Bears a Substantial Relationship to the Particular "Evil" That the Non-Residents Are Said to Present.

It is beyond dispute that the Privileges and Immunities Clause is not absolute, and certainly "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell, supra*, 334 U. S. at 396. Rather, it bars discrimination against citizens of other states only "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* Under the two-pronged test established in *Toomer v. Witsell, supra*, a "substantial reason for the dicrimination" would not exist ". . . unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Id.*, at 398, and there is a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.* at 399.

Following the standards established in *Toomer*, this Court recently held in *Hicklin v. Orbeck, supra*, that a resident preference requirement imposed by state law on private contractors engaged in construction work related to Alaska's oil and gas leases which was designed to alleviate high unemployment, violated the Privileges and Immunities Clause. This Court observed that even if "a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents"—a proposition

considered "dubious", *Id.*, 437 U. S. at 526, the Alaska hire law was still constitutionally invalid. The Court stressed that there was no showing that nonresidents were "a peculiar source of the evil" of high unemployment that the statute was enacted to remedy:

> What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents . . . were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities . . .

Id., at 526-27. Moreover, the Court reasoned that even if the State had demonstrated that nonresidents were a "peculiar source of the evil," the statute still violated the second prong of the *Toomer* test, since the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent:

> Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job training program.
>
> . . . .
>
> Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska

> Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Id., at 527-28.[42]

The analogy to the case at bar is compelling. Although the stated purpose of the Camden ordinance is to reduce unemployment, the City has offered no evidence that nonresidents are a peculiar source of unemployment within the municipality.[43] Moreover, the ordinance, in barring nonresidents from construction jobs in Camden will simply result in exporting the problem of unemployment, a solution heretofore not permitted by the Federal

42. Following this rational, courts in New Jersey in *Neshaminy Constructors, Inc. v. Krause*, New York in *Salla v. County of Monroe, supra* and Massachusetts in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra*, have struck down state statutes which granted an absolute job preference to state residents on all public works construction projects. Like the State of Alaska in *Hicklin*, the State of New York sought to justify its resident preference as necessary to relieve unemployment. In finding this purpose insufficient, the New York Court of Appeals emphasized:

> "Granted that the counteracting of unemployment is a legitimate State concern, the relevant criteria for all privileges and immunities analysis still are whether non-residents are a 'peculiar source' of the evil of joblessness in New York and whether the statute is fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who do not contribute to it. In the end, nothing less than a unique link between the interest served and the discrimination practiced will do." *Salla v. County of Monroe, supra*, 48 N. Y. 2d at 523, 399 N. E. 2d at 913-14, 423 N. Y. S. 2d at 882.

43. While it is certainly true that any job performed by a nonresident is not performed by a Camden resident, this argument was rejected as "simplistic" by the New York Court of Appeals when it was raised as a justification for the New York resident preference law. *Salla v. County of Monroe, supra*, 48 N. Y. 2d at 523, 399 N. E. 2d at 914, 423 N. Y. S. 2d at 882.

Constitution. *Edwards v. California,* 314 U. S. 160 (1941).

Nor is there the "reasonable" or "substantial" relationship between the discrimination practiced and the interest served by the ordinance as required by *Hicklin v. Orbeck, supra,* 437 U. S. at 526, 527. The ordinance does not draw its preference in terms of "unemployed residents", but only in terms of Camden residents, offering an across-the-board preference to all City residents, employed or unemployed, rich and poor. As such, Camden can offer no substantial reason for the onerous burden placed on out-of-state residents "beyond the mere fact that they are citizens of other States." *Toomer v. Witsell, supra,* 334 U. S. at 396.

Unemployment is a blight on the national landscape which knows no political or geographic boundary.[44] While

44. Thus, while the stated purpose of the Camden resident preference ordinance was to reduce unemployment, according to the United States Bureau of Labor Statistics, unemployment in the City of Philadelphia in 1980 was 12.4%, black unemployment 20.9%, and black male unemployment 22.5%. The problem of black youth unemployment was even more distressing. According to a recent report of the Urban League of Philadelphia,

> "[n]owhere in the United States—with the possible exception of Detroit—has the problem of minority youth unemployment reached the crisis proportions that it has in Philadelphia . . . . In Philadelphia, the [official] unemployment rate among [minority] 16 to 19 years old was 32.1 percent—a rate topped only by Detroit where 39.8 percent of those in that age group were unemployed. The national teenage unemployment rate is just under 18 percent . . . . According to the National Urban League's calculations, the black unemployment in an area is generally about twice that of the official rate for the population as a whole. Called the Hidden Unemployment Index, this formula counts discouraged workers no longer looking for work as well as those working part-time who are actually seeking full-time jobs. Under this index, the black youth unemployment rate in Philadelphia was probably more than

local governments may suffer heavy financial burdens, unemployment is a common concern of all the states in the Union. A City may not simply construct a self-enclosed "Berlin Wall" in an effort to export unemployment or to solve its problems at the expense of citizens of neighboring states. To uphold the constitutionality of the Camden resident preference ordinance would significantly compromise the underlying vision of the Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

II. The Camden Resident Hiring Quota Violates the Commerce Clause.

A. The Camden Ordinance Is Not Immune From Review Under the Commerce Clause, Since the City Is Not Acting as a Market Participant, But Seeking to Use Its Control Over Public Works Construction Projects to Regulate Employment in the Private Market.

It is well settled that although the Commerce Clause grants to Congress the power "[t]o regulate commerce among the several states," this "Court has long recognized that it also limits the power of the states to erect barriers against interstate trade." *See e.g., Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980); *Hughes v. Oklahoma*, 441 U. S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U. S. 617, 623 (1978). Indeed, "[t]he very purpose of the Commerce Clause was to create an area of

44. (Cont'd.)

60 percent in 1980 and is still rising. At a minimum, at least four out of every 10 non-white teenagers who wanted to work was jobless in 1980."

W. Johnson, "The Dilemma of Youth Unemployment," *The State of Black Philadelphia 1982*, at 73, 75 (Urban League of Philadelphia, 1982).

free trade among the several states." *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944). The Commerce Clause crystallizes the necessity of centralized regulation among the states so ". . . every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any." *See H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525, 539 (1949). The guiding principle that ". . . the State may not promote its own economic advantages by curtailment or burdening of interestate commerce . . ." is one ". . . deeply rooted in both our history and our law." *Id.*, at 532-33. Thus, this Court has consistently held that the Commerce Clause "precludes a State from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, — U. S. —, 102 S. Ct. 1096, 1100 (1982). *See, e.g., Hughes v. Oklahoma, supra* (statute prohibiting transport or shipment outside of state of minnows seized or procured within state waters); *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1 (1928) (statute requiring shrimp processing to be done in-state); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923) (legislation requiring gas extracted in-state to be supplied to state residents before export).

The Camden ordinance seeks to alleviate local unemployment by barring out-of-state residents from competing for at least 40 per cent of the jobs offered by private contractors engaged in public works construction projects for the City. As such, this ordinance fosters the evils of economic protectionism and isolationism which have long been condemned under the broad purposes of the Commerce Clause:

> This principle that our economic unit is the Nation which alone has the gamut of powers necessary to

> control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.

H. P. Hood & Sons v. DuMond, supra, 336 U. S. at 537-38.

The New Jersey Supreme Court, while recognizing that this Court has often invoked the Commerce Clause to strike down legislation that unreasonably impedes the flow of commerce across state lines, held that the Camden ordinance is immune from scrutiny under the Commerce Clause, since the City is acting in the role of market participant, not market regulator. (App. 22). Relying upon this Court's holdings in *Hughes v. Alexandria Scrap, Inc.*, 426 U. S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980), the court stressed that the City is "not regulating the flow of commerce between private parties . . ." (App. 22) but, as a market participant, is merely "favor-[ing] its own citizens and choos[ing] the parties with whom it will deal." (App. 23-4).

In so holding, the lower court has completely misconstrued the nature of the City's conduct. In the instant case, Camden is not acting as a market participant, but as a regulator of the employment relationship between private contractors and their employees. While arguably a requirement that all public works contracts be performed by Camden based companies might involve the City as a market participant, *see American Yearbook Company v. Askew*, 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.*, 409

U. S. 904 (1972), in the case *sub judice*, the City is seeking to use the carrot of public construction contracts to control the hiring decisions of private employers. Here, the City of Camden is regulating both the primary relationship between the City and its public works construction contractors, as well as the secondary relationship between these contractors and their employees. The City's interest in the employment decisions of private contractors is far too attenuated to permit its conduct to escape scrutiny under the Commerce Clause.

Moreover, this is not a matter where the City freely on its own has decided to participate in the market and exercise its right to favor its own citizens over others. *Hughes v. Alexandria Scrap, supra*, 426 U. S. at 810. Rather, the Camden ordinance was adopted in response to a regulatory scheme passed by the New Jersey Legislature, and became operative *only upon* approval by the Chief Affirmative Action Officer of the State Treasury. Absent such approval, Camden would have been unable to compel private contractors to hire local residents. In addition, this is not simply a matter of a municipality using city funds to serve local citizens. *Reeves, Inc. v. Stake, supra*, 447 U. S. at 442. Rather, the ordinance applies whenever the City spends revenues for construction projects from *any public source*, with the vast bulk of the funding for such projects derived from state and federal grants. Thus, the City is only able to participate in the market place to the extent that its conduct has been authorized by the State, and its funding generated by other political entities.

Nor are the holdings of *Hughes v. Alexandria Scrap Corp., supra*, or *Reeves, Inc. v. Stake, supra*, applicable to the case at bar. In upholding the more stringent vehicle documentation requirements for out-of-state processors in *Alexandria Scrap Corp.*, this Court stressed that unlike prior cases voiding state laws inhibiting interstate commerce, "Maryland has not sought to prohibit the flow of

hulks, or to regulate the conditions under which it may occur." *Id.*, 426 U. S. at 806. Similarly, in affirming the right of South Dakota to give state buyers an absolute preference in the purchase of cement from a state owned and operated cement plant in *Reeves*, this Court emphasized that South Dakota has not erected an absolute bar to interstate commerce, since the State does not prohibit the resale of cement. *Id.*, 447 U. S. at 444, n. 17. But the Camden ordinance achieves that very result, for the City is not merely deciding with whom it will deal, but it is preventing the contractors favored by the City from hiring out-of-state residents. Thus, it is no different than if South Dakota in *Reeves*, had restricted the resale of cement to state residents, and Maryland in *Alexandria Scrap*, had prohibited the flow of hulks, actions which this Court indicates would have been constitutionally infirm.

The lower court's ruling that the Camden resident preference which discriminates against out-of-state residents, is immune from scrutiny under the Commerce Clause stands in stark contrast to this Court's "repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H. P. Hood & Sons, Inc. v. DuMond*, *supra*, 336 U. S. at 532. While the Commerce Clause may not prohibit a city from participating in the market and favoring its own citizens, *Hughes v. Alexandria Scrap*, *supra*, 426 U. S. at 810, the mere involvement of a governmental unit does not talismanically confer governmental conduct with immunity from Commerce Clause scrutiny. Surely, a Camden ordinance mandating that all developers within the City provide 40 per cent of all their jobs to local residents would be impermissible under the Commerce Clause. Imposing such a restriction upon only a portion of the developer's work—that performed on public works projects—is repugnant to the very same constitutional principles. The mere use of public

funds or participation of the municipality does not automatically exempt the City's actions from constitutional review.[45]

> [T]he Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is [the court's] duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. (citations omitted).

Best & Co. Inc. v. Maxwell, 311 U. S. 454, 455-56 (1940). Here, Camden is acting not as a market participant but as a mere conduit, and it should not be permitted to use its governmental status to choke off the stream of interstate commerce. To hold otherwise, as did the court below, "would be to eat up the rule under the guise of an exception." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935).

B. The Camden Ordinance Imposes an Impermissible Burden on Interstate Commerce.

Admittedly, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *The Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U. S. 366, 371 (1976). In the absence of conflicting Congressional legislation, "the States retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected." *Lewis v. BT Investment Managers, Inc., supra*, 447 U. S. at 36. However, even when acting to further a "legitimate local concern," each State must act in a manner consistent

45. *See, Smith v. Department of Agriculture of the State of Georgia*, 630 F. 2d 1081 (5th Cir. 1980), *cert. denied*, 452 U. S. 910 (1981) (held a Georgia regulation whereby nonresidents were assigned to inferior sales locations at the State farmers market during crowded conditions is violative of the Commerce Clause).

with the "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc., supra*, 294 U. S. at 527.

> However important the state interest at hand, 'it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.' *Philadelphia v. New Jersey*, 437 U. S. at 626-27

Lewis v. BT Investment Managers, Inc., supra, 447 U. S. at 36.

Although incidental burdens on interstate commerce are upheld when necessary to ensure a state's protection of public health and safety, this Court has stressed that "where simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U. S. at 624. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders. *Id.*

Certainly, the Camden resident hiring quota creates a "patent discrimination against interstate trade." *Id.*[46] The ordinance prohibits out-of-state residents from applying

46. It is beyond dispute that a local ordinance may create an unlawful infringement on interstate commerce. *See, Dean Milk Co. v. City of Madison, supra.* Similarly, the movement of persons falls within the protection of the Commerce Clause. *See e.g., Edwards v. California, supra*, 314 U. S. at 172; *Colgate v. Harvey*, 296 U. S. 404, 444 (1935) (Stone, J., dissenting) ("This Court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce subject to the regulations and entitled to the protection of the national government under the Commerce Clause."); *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F. 2d 70, 73 (5th Cir.), *aff'd. mem.*, 449 U. S. 913 (1980).

for work from private contractors for at least 40 percent and possibly 100 percent of all the positions on any public works job for the City of Camden.[47] This ordinance is particularly burdensome, since many of the affected employees are "steady hands", who work regularly for the same contractor and will have to be laid off every time that contractor accepts a job in Camden. Surely, the "aim" and "effect" of such discrimination is "establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G. A. F. Seelig, Inc., supra*, 294 U. S. at 527.

The danger of this kind of economic parochialism is that it merely encourages "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent." *Douglas v. Seacoast Products, Inc.*, 431 U. S. 265, 286 (1977).

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual states to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects . . . (citation omitted).

Boston Stock Exchange v. State Tax Commission, 429 U. S. 318, 329 (1977). Thus, in invalidating a New York statute placing restrictions upon the in-state sale of milk produced in other states, Mr. Justice Cardozo warned:

> We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual

47. The ordinance mandates that at least 40 percent of the employees hired must be Camden residents. It further specifies that "[t]he developer/contractor, in hiring for jobs, shall make every effort to employ persons residing with the City of Camden . . ." (App. 56), resulting in the real possibility that out-of-state residents may be completely barred from public construction employment opportunities.

> jealousies and other economic retaliation . . .' If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation (citations omitted).

Baldwin v. G. A. F. Seelig, supra, 294 U. S. at 522.

Nor can Camden justify its ordinance on the legitimacy of its objective of alleviating unemployment, as the evil of protectionism can reside in legislative means as well as the legislative purpose. *City of Philadelphia v. New Jersey, supra.* Whatever the validity of Camden's ultimate purpose, it may not be accomplished by placing onerous burdens on interstate commerce, or by seeking to isolate itself from the national economy.

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition . . . or to create jobs by keeping industry within the State . . . or to preserve the State's financial resources from depletion by fencing out indigent immigrants . . . In each of these cases, a presumably legitimate goal was sought to be achieved by . . . illegitimate means . . .
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> * * *
>
> . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. (citations omitted)

City of Philadelphia v. State of New Jersey, supra, 437 U. S. at 627-28.

However, even if the Camden resident hiring quota is not found to be protectionist and thus subject to the

"virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra,* it still constitutes an impermissible restriction on interstate commerce under the less stringent standard of review, established by this Court in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). For under this test,

> . . . the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake . . . (citations omitted)

Hunt v. Washington State Apple Advertising Commission, 432 U. S. 333, 353 (1977).

In the case at bar, while Camden's efforts at reducing unemployment are worthy, the enacted statute is far too overbroad. By offering an automatic preference to all Camden residents, a highly skilled, educated and employed worker is entitled to the same preference as an unskilled, habitually unemployed worker. Moreover, as this Court stressed in *Hicklin v. Orbeck, supra,* 437 U. S. at 528, certain less discriminatory alternatives to this across-the-board residents' preference, such as "a preference to unemployed residents or to residents enrolled in job training programs" might possibly be constitutional. Such alternatives could have been adopted by Camden, rather than the overly broad, parochial legislation which was enacted.

Certainly, the vitality and health of the nation depend upon the ability of cities and states throughout the country to engage in economic experiments and novel undertakings. But this does not mean that there are no boundaries to the permissible area of such legislative activity.

> There are. And none is more certain than the prohibition against attempts on the part of any single

> State to isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' *Baldwin v. Seelig*, 294 U. S. 511, 523.

Edwards v. California, supra, 314 U. S. at 173-74. In upholding the Camden resident hiring quota, the New Jersey Supreme Court has endorsed parochial isolation and Balkanization to the detriment of the residents in the surrounding states. Yet these were the very evils which the Commerce Clause was designed to eliminate.

III. The Camden Ordinance, by Requiring a Year's Residence in the City as a Condition for Preference for at Least 40 Per Cent of the Jobs Offered by a Private Contractor Engaged in Public Works Construction Projects for the City, Violates the Equal Protection Clause, Since Such a Durational Residency Requirement Creates an Invidious Classification That Impinges on the Fundamental Right of Interstate Travel.

Even if this Court finds that the lower court did not err in holding that the Camden resident hiring quota was constitutional both under the Privileges and Immunities Clause of Article IV, § 2 and the Commerce Clause, the City's ordinance, by imposing a durational residency requirement, impinges on the fundamental constitutional right of interstate travel, and violates the Equal Protection

Clause of the Fourteenth Amendment, absent proof of a compelling state interest. *See e.g., Shapiro v. Thompson*, 394 U. S. 618 (1969); *Dunn v. Blumstein*, 405 U. S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). In upholding the ordinance, the New Jersey Supreme Court completely ignored the distinction that has been drawn in "right to travel" cases between continuing and durational residency requirements, and failed to recognize that the Camden ordinance impermissibly denies access to private employment opportunities based on both place and length of residency.

The right of interstate travel has been repeatedly recognized as a basic constitutional right. *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 255, n. 7.[48] Although the textual source of this right has been the subject of debate,[49] its fundamental nature has been consistently recognized by this Court. *Jones v. Helms*, 452 U. S. 412, 418 (1981). In *United States v. Guest*, 383 U. S. 745, 757-58 (1966), this Court explained that:

> . . . [t]he Constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has

48. Indeed, this Court recently observed that "[t]he constitutional right of interstate travel is virtually unqualified." *Califano v. Torres*, 435 U. S. 1, 4, n. 6 (1978) (per curiam).

49. Supreme Court decisions have located the source of the right to travel in various constitutional provisions, including the Privileges and Immunities Clause of Article IV, § 2, *Ward v. Maryland, supra*, 79 U. S. (12 Wall) at 430; the Commerce Clause, *Edwards v. California, supra*, 314 U. S. at 177; the Privileges and Immunities Clause of the Fourteenth Amendment, *Id.* at 178 (Douglas, J., concurring); *Id.* at 181-83 (Jackson, J., concurring); *Twining v. New Jersey*, 211 U. S. 78, 79 (1908); and the due process clauses of the fifth and fourteenth amendments, *Williams v. Fears*, 179 U. S. 270, 274 (1900); *Shapiro v. Thompson, supra*, 394 U. S. at 671 (Harlan, J., dissenting).

> been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution . . . (citations omitted)

In striking down durational residency requirements, this Court has stressed that such classifications "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn v. Blumstein, supra,* 405 U. S. at 342. In the case at bar, by conditioning access to employment opportunities based on length of residency, the City of Camden is creating two classes of needy resident families indistinguishable from each other except by length of municipal residence. Thus, Camden is forcing a person who wishes to travel and change residences to choose between travel and access to employment opportunities. *See, Dunn v. Blumstein, supra,* 405 U. S. at 342.

"Although any durational residence impinges to some extent on the right to travel," *Memorial Hospital v. Maricopa County, supra,* 415 U. S. at 256, this Court has never declared such a classification to be *per se* unconstitutional. *Id.* Rather, it has stressed that it must "determine whether such requirements penalize citizens for exercising their constitutional right to travel." *Jones v. Helms, supra,* 452 U. S. at 420-21, and if so, such a classification may only be justified by a compelling state interest. *Memorial Hospital v. Maricopa County, supra,* 415 U. S. at 258. Thus, the courts have required a showing of a compelling state interest and struck down durational residency requirements

for welfare benefits,[50] voting,[51] nonemergency medical services, [52] public housing,[53] and veteran benefits.[54] This Court has never considered the question of durational residency requirements for public employment. However, lower courts have overwhelmingly invalidated state [55] and local [56] residence preference requirements for government

50. *Shapiro v. Thompson, supra,* (one year waiting period for welfare benefits).

51. *Dunn v. Blumstein, supra,* (one year state and three month county residency requirements for voting).

52. *Memorial Hospital v. Maricopa County, supra,* (one year residency requirement for county-funded nonemergency medical care).

53. *See, e.g., Cole v. Housing Authority,* 435 F. 2d 807 (1st Cir. 1970) (two year waiting period for subsidized public housing); *King v. New Rochelle Municipal Housing Authority of City of Newport,* 442 F. 2d 646 (2d Cir.), *cert. denied* 404 U. S. 863 (1971) (five year residency requirement for admission to public housing).

54. *See, e.g., Strong v. Collatos,* 593 F. 2d 420 (1st Cir. 1979) (three year residency requirement for receipt of certain veterans' welfare benefits); *Barnes v. Board of Trustees, Michigan Veterans Trust Fund,* 369 F. Supp. 1327 (W. D. Mich. 1973) (five year durational residency requirement to qualify for aid from Veterans Trust Fund).

55. *See, e.g., Nehring v. Ariyoshi,* 443 F. Supp. 228 (D. Hawaii 1977) (one year state residence requirement on applicants for state and local government jobs); *Justice v. Manzagol,* 11 E. P. D. ¶ 10,758 (D. N. M. 1976) (one year residence for all state nonprofessional employees); *State v. Wylie,* 516 P. 2d 142 (Alaska 1973) (personnel rules giving absolute hiring preference to one-year Alaskan residents).

56. *Jenkins v. McCollum,* 446 F. Supp. 667 (N. D. Ala. 1978) (county residency requirement for federally funded county position); *Spradling v. Hutchinson,* 253 S. E. 2d 371 (W. Va. 1979) (requirement that applicant for police officer must have been resident of city where he is applying or of county where city is situated for at least one year any time prior to his application);

employment, private employment on public projects,[57] commercial fishing[58] and veterans preference in public employment.[59] Access to employment opportunities is as much "a basic necessity of life" as nonemergency medical care or welfare assistance, *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 259, and as such, may only be abridged upon the showing of a compelling state interest.[60]

56. (Cont'd.)

Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P. 2d 801 (1973) (city charter provision favored one-year city or county residents for municipal employment); *Contra, Town of Milton v. Civil Service Commission*, 365 Mass. 368, 312 N. E. 2d 188 (1974) (upheld durational residence preference for local police officers).

57. *People Ex Rel. Holland v. Bleigh Construction Co., supra* (one year durational residence in state for preference for employment on public works projects).

58. *Hassan v. Town of East Hampton*, 500 F. Supp. 1034 (E. D. N. Y. 1980) (one year of town residence required to obtain commercial shellfishing license); *Massey v. Apollonio*, 387 F. Supp. 373 (D. Maine 1974) (statute requiring presence within state for at least 8 months of each year for three successive years to receive lobster fishing license).

59. *Carter v. Gallagher*, 337 F. Supp. 626 (D. Minn. 1971), *aff'd* 452 F. 2d 315 (8th Cir.), *cert. denied*, 406 U. S. 950 (1972) (five year residency requirement for veterans preference); *Stevens v. Campbell*, 332 F. Supp. 102 (D. Mass. 1971) (five year consecutive residence in state for preference in employment in classified civil service).

60. Nor does the fact that there is no fundamental constitutional right to public employment, *see, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 313 (1976) compel a contrary conclusion. There is no fundamental right to welfare, *Dandridge v. Williams*, 397 U. S. 471, 483 (1970) but strict scrutiny was still used in *Shapiro v. Thompson, supra*, because the durational residency requirement impacted upon the fundamental right of interstate travel. Similarly, the Camden ordinance seeks to place an absolute condition on an individual's right of interstate travel. Government may not abridge constitutional rights

Moreover, unlike *Sosna v. Iowa*, 419 U. S. 393 (1975), which upheld a one-year residency requirement for a divorce action within the state, on the ground that the Iowa statute only resulted in an inconvenient delay rather than foreclosing the newly arrived resident from obtaining a divorce, *Id.*, at 406, the denial of employment opportunities effected by the Camden ordinance irretrievably deprives all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood. In addition, unlike divorce, where the state has a vital interest in "requiring that those who seek a divorce . . . be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack," *Id.*, at 409, the problem of unemployment is of national scope, and cannot be solved at the expense of the plight of neighboring states.

Admittedly, bona fide residency requirement have been consistently upheld for municipal employees.[61] However, in each of these cases, the courts have consistently distinguished between continuing residency requirements at the time of employment, which are permissible, and durational residency requirements prior to employment,

60. (Cont'd.)

by direct action nor condition their exercise on their surrender. *Keyishian v. Board of Regents of New York*, 385 U. S. 589, 605 (1967).

61. *See, e.g., McCarthy v. Philadelphia Civil Service Comm'n, supra*, (fire department employee); *Wright v. City of Jackson, Mississippi*, 506 F. 2d 900 (5th Cir. 1975) (fire department employees); *Wardwell v. Board of Education of City School District*, 529 F. 2d 625 (6th Cir. 1976) (school teacher); *Andre v. Board of Trustees of Village of Maywood*, 561 F. 2d 48 (7th Cir. 1977), *cert. denied*, 434 U. S. 1013 (1978) (municipal employee); *Detroit Police Officers Association v. City of Detroit*, 385 Mich. 519, 190 N. W. 2d 97 (1971), *app. dismissed*, 405 U. S. 950 (1972) (police officer).

which the courts have indicated are invalid.[62] Thus, in *McCarthy v. Philadelphia Civil Service Comm'n, supra,* in a *per curiam* opinion upholding a continuing residency requirement for municipal employees, this Court stressed:

> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus, in *Shapiro* . . . we stated "[T]he residence requirement and the one-year waiting period requirement are distinct and independent prerequisites," And in *Memorial Hospital* . . . quoting *Dunn* . . . the Court explained that *Shapiro* and *Dunn* did not question 'the validity of appropriately defined and uniformly applied bona fide residence requirements.' (citations omitted)

424 U. S. at 647. However, in upholding the Camden resident hiring quota, the New Jersey Supreme Court completely ignored this vital distinction.

Nor are the municipal hiring cases applicable to the case at bar. The Camden residency requirement is not being applied to public employees where the City is acting *qua* employer, but is being imposed upon non-municipal employees, who merely happen to have been hired by those contractors or developers with whom the City is doing business. None of the justifications which support a bona fide residency requirement when the city acts as employer are relevant when the city acts as regulator. This distinction was clearly articulated by the Minnesota Supreme Court in *Berg v. City of Minneapolis,* 274 Minn. 277, 143 N. W. 2d 200 (1966), where that Court, in upholding a continuing residency requirement

62. *Wright v. City of Jackson, supra,* 506 F. 2d at 902; *Wardwell v. Board of Education, supra,* 529 F. 2d at 627-28; *Andre v. Board of Trustees of Village of Maywood, supra,* 561 F. 2d at 52-3; *Mogler v. Sevier County School District,* 540 F. 2d 478, 483 (10th Cir. 1976), *cert. denied,* 429 U. S. 1121 (1977).

for police officers, distinguished *Construction and General Laborers Union Local 563 v. City of St. Paul, supra* (which had struck down a St. Paul ordinance compelling contractors who performed work for the City to employ only county residents) by stating:

> It did not involve government employment but dealt with the subject of people engaged in construction and general labor for contractors doing work on a city project. Such work does not involve public service of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life. It does not disturb the well-established rule that public employment is not a right but a privilege, and the legislature may give the municipality the authority to impose reasonable restrictions upon the activities of the municipality as a part of their terms of employment . . . (citations omitted)

Id., 274 Minn. at 281, 143 N. W. 2d at 203.

In seeking to condition access to private employment upon length of residence, the classification created by the Camden residence requirement, "unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 262. To make such a showing, the state has the heavy burden both of demonstrating that its interests are substantial and that the means adopted are narrowly drawn.

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve

> their legitimate objectives . . . and if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose, "less drastic means . . ." (citations omitted)

Dunn v. Blumstein, supra, 405 U. S. at 343.

Whether the test be that of a compelling state interest or even minimum rationality, the Camden residency requirement must fail. The classification employed by the ordinance is not even remotely tailored to further the city's purported interest in reducing unemployment. Rather than targeting the employment preference to the long term unemployed, the ordinance merely benefits long term residents. Moreover, rather than increasing the number of jobs, the ordinance simply limits the universe of those who may compete for them. Reducing unemployment may constitute a valid state interest, but it may not be achieved by means which are repugnant to fundamental constitutional rights.

IV. The Decision of the Lower Court Upholding the Camden Resident Hiring Quota Should Be Summarily Reversed, or in the Alternative, This Case Consolidated With *Mass. Council of Construction Employers v. Mayor of Boston.*

As demonstrated *supra,* we believe that the New Jersey Supreme Court committed serious constitutional errors in upholding the Camden resident hiring quota, and its decision should be summarily reversed. However, in the alternative, this matter should be consolidated with *Mass. Council of Construction Employers v. Mayor of Boston, supra,* which is now pending before this Court.

Consolidation will serve the interests of justice and judicial economy, by ensuring plenary consideration of

this issue which is of vital concern to the public. Thus, regardless of the Court's determination of the validity under the Commerce Clause of the Boston ordinance in *Mass. Council of Construction Employers v. Mayor of Boston, supra,* resident preference statutes still may be improper under the Privileges and Immunities Clause or Equal Protection Clause, issues which are not being raised at all in connection with the Boston ordinance. Moreover, unlike *Mass. Council of Construction Employers v. Mayor of Boston,* where the preference is imposed pursuant to an Executive Order, the ordinance in the case *sub judice* was passed pursuant to a state statutory scheme. Such a difference may have a significant impact on the constitutional validity of the ordinance.

As long as unemployment remains a national dilemma, states and their political subdivisions will continue to wrestle with appropriate responses. Consolidation of this case will permit this Court to provide much needed guidance to localities throughout this country and to correct serious constitutional errors.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to note probable jurisdiction of this appeal and resolve the substantial federal question submitted herein.

Respectfully submitted,

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
41 S. Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Appellant

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-79 September Term 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

Argued December 15, 1981—Decided February 18, 1982

On certification to the Department of Treasury.

Steven K. Kudatzky argued the cause for appellant (*Tomar, Parks, Seliger, Simonoff & Adourian*, attorneys).

Laurence E. Rosoff, City Attorney, argued the cause for respondent Mayor and Council of the City of Camden.

Joseph L. Yannotti, Deputy Attorney General, argued the cause for respondent The Department of the Treasury of the State of New Jersey (*James R. Zazzali*, Attorney General of New Jersey, attorney; *Andrea M. Silkowitz*, Deputy Attorney General, of counsel).

The opinion of the Court was delivered by PASHMAN, *J.*

This appeal of an administrative agency decision implicates the constitutional powers of both state and local government. At issue are two provisions of an ordinance enacted in 1980 by the City of Camden mandating affirmative action by private construction companies awarded public works contracts by the city government. Both provisions enact goals that exceed the minimum requirements in the State Treasurer's affirmative action rules, *R.* 1977, *d.* 364, *N.J.A.C.* 17:27-1.1 to 13.2, promulgated pursuant to the amendments to the Law Against Discrimination concerning affirmative action in public works contracting, *L.* 1975, *c.* 127, *N.J.S.A.* 10:5-31 to 38.

The first provision establishes a 25% minority [1] hiring goal for contracts with the City of Camden, which is more rigorous than the 20% goal set by the State Treasurer for all other public works contracts in Camden County. The second provision requires that 40% of the labor force in Camden City public works projects be city residents. The State Treasurer had set no residency quotas or goals. Appellant United Building and Construction Trades Council of Camden County and Vicinity (Council), an association of labor organizations, challenges State approval of the Camden program as both unauthorized under the Law

1. "Minority worker" for purposes of both the Camden ordinance and the State Treasurer's minority hiring guidelines includes the same persons. The Camden ordinance defines "minority" to include persons who are Black, Hispanic, Asians, American Indians or women. The Treasury Department rules define "minority worker" to include persons who are Black or Spanish-American, Asian or American Indian. *N.J.A.C.* 17:27-2.1. However, for purposes of the Department's minority hiring goals, "minority" also includes females. Thus, although females are not a numerical minority in this State, throughout the opinion "minority" includes women, unless otherwise indicated.

Against Discrimination, *N.J.S.A.* 10:5-1 to 38, and unconstitutional. The Court now holds that approval of these provisions by the State Treasurer was proper under the statute. We also hold that neither provision violates the United States or New Jersey Constitution, and that the resident hiring quota is not preempted by state statute.

I

The 1975 amendments to the Law Against Discrimination, mandating affirmative action in public works contracting, *L.* 1975, c. 127, *N.J.S.A.* 10:5-31 to 38, are typical of state and federal statutes that seek to use the government's purchasing power to promote equal opportunity in the construction trades. *See generally* Public Works Employment Act of 1977, 97 *Stat.* 116, 42 *U.S.C.* § 6701 *et seq.*; *Fullilove v. Klutznick*, 448 *U.S.* 448, 473, 65 *L.Ed.*2d 902, 921 (1980) (upholding federal affirmative action quotas for minority contractors). Under the act, state and local governments, in their roles as marketplace participants, require the contractors they hire to make efforts to employ more minority workers.

The affirmative action provisions do not directly affect contracts between private parties. The minority hiring goals pertain only to contracts with the State, its political subdivisions, and agencies or authorities created by state and local government. *N.J.S.A.* 10:5-32. In enacting the affirmative action amendments to the Law Against Discrimination, the Legislature chose to delegate the responsibility for promulgating specific hiring goals. The statute provides that no public works contract monies shall be paid to any contractor, subcontractor or firm that has not guaranteed compliance with an affirmative action program approved by the State Treasurer. *N.J.S.A.* 10:5-32. To this end, the statute empowers the State Treasurer

> a. To investigate and determine the percentage of population of minority groups in the State or areas thereof from which the work force for public works contracts is or may be drawn;
>
> b. To establish and promulgate such percentages as guidelines in determining the adequacy of affirmative action programs submitted for approval pursuant to section 2 of this act . . .
>
> [*N.J.S.A.* 10:5-36 (footnote omitted)]

The State Treasurer has discretion to promulgate specific affirmative action requirements as long as they are based on "the percentage of population of minority groups in the State or areas thereof," *N.J.S.A.* 10:5-36(a).

Pursuant to his statutory mandate, the State Treasurer promulgated comprehensive affirmative action rules in September 1977. *R.* 1977, *d.* 364, *N.J.A.C.* 17:27-1.1 to 13.2, which included "employment goals" for the hiring of minorities in each of New Jersey's 21 counties. *N.J.A.C.* 17:27-7.3. In light of the State Treasurer's power "[t]o require all State and local agencies awarding public works contracts to submit for approval their affirmative action programs," *N.J.S.A.* 10:5-36(c), the rules further provided for approval of any local affirmative action program that conforms to the statutory and administrative requirements, and "establishes an employment goal which is *not lower than* the applicable goal established by [*N.J.S.A.* 17:27-7.3]." *N.J.A.C.* 17:27-6.5 (emphasis added).

After the State Treasurer promulgated the 1977 affirmative action rules, a group of Camden citizens approached city officials to inquire about the enactment of an affirmative action program for city public works contracts. The mayor appointed Camden City attorney, Louis A. Vargas, to head a task force of city residents. By

May 1980, a proposed affirmative action ordinance had been drafted.[2]

On July 24, 1980 the Camden City Council adopted "an ordinance to establish an affirmative action program in connection with construction contracts to be performed for or on behalf of the City of Camden." The ordinance noted that according to 1977 U.S. Labor Department statistics, the unemployment rate for Camden was 11.5% compared with 8.1% state-wide and 7.6% county-wide. Unemployment among Black Americans in the city was 18.4%, and among Hispanic Americans 15.6%. The ordinance noted further that unemployment in Camden had increased significantly since release of the Labor Department statistics.

The ordinance applied to all contracts with the City of Camden involving more than $50,000. It provided that every public works contractor

> . . . shall make every effort to employ not less than 25% minority workers in the utilization of all trades, as tradesmen, journeymen and apprentices, in performance of his/her contract, whether or not the work is subcontracted.

The ordinance defined "minority" and listed several criteria for measuring good faith compliance.

Camden's affirmative action program was amended by a second ordinance, adopted on August 28, 1980. This

2. On May 8, 1980, Vargas sent a copy of the proposed ordinance to the Chief Affirmative Action Officer, Carl G. Briscoe, in the Department of Treasury for review and comment. On May 19, 1980, Briscoe responded to the Camden City attorney's inquiry. Briscoe listed several provisions—not relevant to this appeal—that the Camden ordinance required in order to meet minimum state requirements and receive state approval.

second ordinance provided, in addition to the minority hiring goal, that public works contractors "shall make every effort to employ persons residing within the City of Camden *but in no event shall less than 40% of the entire labor force be residents of the City of Camden.*" [Emphasis added.]

Both the July 24 ordinance and the August 28 amendatory ordinance were submitted on November 14, 1980 to Chief Affirmative Action Officer Briscoe for his approval. On November 24, 1980 Birscoe informed the city that the affirmative action program met minimum state requirements [3] and was approved by the State for the period November 24, 1980 through November 24, 1981.[4] Appellant now challenges this approval of the Camden affirmative action program by the Chief Affirmative Action Officer.

The Council did not participate in the procedure through which the Chief Affirmative Action Officer approved the Camden program. Because the Camden program met all the minimum requirements for state-approved plans, its approval by the Chief Affirmative Action Officer presumably was assured pursuant to *N.J.A.C.* 17:27-6.5. On December 17, 1980 the Council filed a Notice of Appeal with the Appellate Division, pursuant to *R.* 2:2-3, challenging the final determination of the Chief Affirmative Action Officer in approving the Camden plan.

On June 19, 1981 we directly certified the appeal to this Court to decide all issues in the case.

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3. Briscoe reminded the city that since its program applied only to contracts involving more than $50,000, state guidelines would apply to contracts covered by the Department rules and involving payment of less than $50,000.

4. On November 25, 1981, the Camden program was given provisional approval through January 1982. The city was asked to adopt certain procedures not relevant to this appeal.

II

A. *The Department of Treasury's Statutory Authority to Approve the Camden Ordinance.*

Appellant does not contend that the Chief Affirmative Action Officer has no statutory authority to approve local affirmative action plans. The 1975 amendments specifically give the Treasurer the power "[t]o require all State and local agencies awarding public works contracts to submit for approval their affirmative action programs." *N.J.S.A.* 10:5-36(c). Such a provision is superfluous if local government has no authority to promulgate plans that differ in some respects from the State Treasurer's guidelines. The Court presumes that the Legislature does not enact meaningless legislation. *McGlynn v. New Jersey Public Broadcasting Auth.*, — *N.J.* — (1981); 2A Sutherland, *Statutory Construction* (4th ed. 1973) § 46.06.

The Council focuses instead upon the specific decision of the Chief Affirmative Action Officer in approving the Camden ordinance. The Council first contends that although the State Treasurer is empowered to approve local affirmative action programs, the Law Against Discrimination provides no authority for approving hiring goals more rigorous than the applicable county-wide goal. Neither, according to the Council, does the statute provide authority for establishing any resident hiring quotas at all. The Council also contends that even if the State Treasurer can approve local minority hiring goals, the Department abused its discretion by approving Camden's more rigorous goal without any showing of necessity.

The standard of review applied to the State Treasurer's decision to approve the Camden minority hiring goal and resident quota is no different than the standard used to review any other final agency decision. As stated in *New Jersey Guild of Hearing Examiners v. Long*, 75 *N.J.* 544, 561 (1978),

> "[a]dministrative rules and regulations have in their support the rebuttable presumption of validity if they come within the ambit of delegated authority," and . . . . unless such regulations are "clearly *ultra vires* on their face, the party contesting them has the burden of proving their invalidity."
>
> [quoting *In re Regulation F-22, Office of Milk Industry*, 32 *N.J.* 258, 261-62 (1960)]

As a result of this "rebuttable presumption of validity, . . . an *ultra vires* finding is disfavored," *Id.* The grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals. The agency has "such implied incidental powers as may reasonably be adapted to that end." *In re Suspension of Heller*, 73 *N.J.* 292, 303 (1977).

In this case, the scope of the State Treasurer's delegated authority is clear. The relevant law is an amendment to the Law Against Discrimination. It bars public works contractors from discriminating on the basis of "age, race, creed, color, national origin, ancestry, marital status or sex." *N.J.S.A.* 10:5-33. At the same time, the statute mandates affirmative action in public contracting by outlawing public works contracts with any party "which has not agreed and guaranteed to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." *N.J.S.A.* 10:5-32. To this end, the State Treasurer is empowered to determine percentages of minority populations across the State, *N.J.S.A.* 10:5-36(a), and establish those populations as guidelines in determining the adequacy of affirmative action programs. *N.J.S.A.* 10:5-36(b). Unless the Chief Affirmative Action Officer's decision works "to alter the terms of [the] legislative enactment or frustrate

the policy embodied in the statute," *N.J. Chamber of Commerce v. N.J. Elec. Law Enforce. Comm'n*, 82 *N.J.* 57, 82 (1980), by impeding or acting arbitrarily with regard to promotion of equal opportunity in public works contracting through affirmative action, the decision will be affirmed.

1. *The 25% minority hiring goal.*

The State Treasurer's affirmative action rules include "employment goals" for the hiring of minorities in each of New Jersey's 21 counties. These goals range from a low of 10% in seven counties to a high of 32% in Essex County, reflecting the differing minority population in each area. The goals are clearly not equivalent to the minority populations in each county, since "minority workers" includes women, who we assume represent about 50% of the population in each county. The Camden County goal is 20%. The goal enacted by the City and approved by the State Treasurer is 25%

The State Treasurer's affirmative action rules also impose duties on contractors to undertake a good faith effort to comply with the minority hiring goal if the contractor fails to meet the minority hiring guidelines. *N.J.A.C.* 17:27-7.4. These duties range from seeking assurances of cooperation from unions to notifying minority referral organizations of hiring needs to notifying particular minority workers who are listed with the contractor as awaiting employment. *N.J.A.C.* 17:27-7.4(1), (2)(a)(b).

The amendments to the Law Against Discrimination, *N.J.S.A.* 10:5-31 to 38, say nothing about the specific geographical areas upon which minority hiring goals should be based. The statute does not mandate the use of county-wide hiring goals, as opposed to regional or local goals. The statute instead gives the State Treasurer broad authority "[t]o investigate and determine the percentage

or population of minority groups *in the State or areas thereof* from which the work force for public works contracts is or may be drawn." *N.J.S.A.* 10:5-36(a) (emphasis added). The provision clearly is intended to give the State Treasurer flexibility in establishing goals.

The State Treasurer has decided to establish county-wide goals, reflecting the different minority populations in the State's 21 counties. The use of county-wide hiring goals, however, does not preclude the adoption of different hiring goals within any county, particularly where the minority population varies significantly within different parts of the county.

This is precisely the situation that currently exists in the City of Camden within Camden County. Official 1980 U.S. Census Bureau statistics reveal a marked difference between the minority populations of the two areas. For example, the black population represents 53.0% of Camden City, versus 14.3% of Camden County. Further, 19.2% of Camden City residents identify themselves as being of Hispanic origin.[5] Assuming that about half the city population is female, we can conclude that at least 75% of Camden City residents, and perhaps as many as 90% of city residents, are "minority" workers for purposes of the Camden minority hiring goal. To require that persons con-

5. The 1980 U.S. Census Bureau statistics for the City of Camden show the following racial populations:

Total population	84,910
Caucasion	25,739
Black	45,008
American Indian/Eskimo	193
Asian/Pacific Islands	278
Other	13,692

A total of 16,308 city residents identified themselves as of Hispanic origin. It is not known how these persons identified themselves for purposes of the above racial classification.

tracting with the city make good faith efforts [6] to hire 25% "minority" workers cannot seriously be said to "adversely affect the legislative scheme . . . [or] stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature." *Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed.*, 79 *N.J.* 574, 586-87 (1979) (citations omitted). To the contrary, we would question the fairness of any hiring practices that under such circumstances resulted in construction work forces with substantially fewer than 25% minority workers. The State Treasurer's approval of the 25% minority hiring goal for public works contracts with Camden City is therefore neither *ultra vires* nor an abuse of agency authority under the Law Against Discrimination.

2. *The Camden resident quota.*

The Council argues that approval of Camden's residency quota requiring 40% of all public works contract employees to be city residents is *ultra vires* because the enabling legislation does not contemplate any residency requirement. The Council notes the comprehensive criteria upon which the contractor may not discriminate, including "age, race, creed, color, national origin, ancestry, marital status or sex." *N.J.S.A.* 10:5-33(a). It concludes that since this list excludes residency, the Treasury Department has no authority to approve any affirmative action plan including a residency requirement.

Local affirmative action programs doubtless contain many requirements that were not contemplated by the

6. Although the city's ordinance speaks in terms of making "every effort" to meet the minority hiring goals, as opposed to the State Treasurer's requirement of a "good faith" effort, the Camden ordinance speaks of "criteria for measuring good faith," and the additional criteria it requires to establish that compliance are minimal.

legislators who drafted the affirmative action law or the administrators who promulgated affirmative action rules. Such requirements may be authorized by the implied power of the localities under the Law Against Discrimination, *see New Jersey Guild of Hearing Aid Dispensers v. Long, supra,* 75 *N.J.* at 571, or by the general police power. They may or may not be constitutional or precluded by statute statute. Clearly, State Treasurer approval of a local affirmative action plan pursuant to the Law Against Discrimination does not immunize the plan against constitutional and statutory attack. But as long as the local plan meets the minimum state requirements, *N.J.A.C.* 17:27-6.5, and does not frustrate the statutory goals of affirmative action, *N.J.S.A.* 10:5-32, and equal opportunity, *N.J.S.A.* 10:5-33, in public works contracting, State Treasurer approval of a local plan including such a provision is not *ultra vires* or an abuse of discretion.

If the minority population of the City of Camden were less than that of the surrounding area, a resident hiring quota might impede the hiring of additional minority workers. The ordinance might then be found to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature." *Fair Lawn Ed. Ass'n, supra.* But to the contrary, Camden has a higher percentage of minority population than other areas of the county. As a consequence, a duty to hire Camden residents could only increase the likelihood that any contractor will meet the State Treasurer's minority hiring goals. We therefore hold that the State Treasurer did not act outside the scope of his statutory authority under the Law Against Discrimination in approving the Camden ordinance.

We next address constitutional and statutory challenges to the affirmative action and resident hiring goals in the ordinance.

B. *Constitutionality of affirmative action hiring goals.*

In its brief, the Council states that it does not challenge the constitutionality of either the relevant amendments to the Law Against Discrimination, *N.J.S.A.* 10:5-31 to 38, or the State Treasurer's affirmative action rules, *N.J.A.C.* 17:27-.1.1 to 13.2. However, for purposes of constitutional analysis there is no distinction between a challenge to the particular minority hiring goal established for the City of Camden and a challenge to the State Treasurer's minority hiring goals in general. No argument can be made that approval of a 25% minority hiring goal for the City of Camden was arbitrary administrative agency action or action that in any other way violated appellant's constitutional due process rights. Moreover, even if we assume that municipalities have less authority than the State to legislate in affirmative action matters, a proposition we expressly decline to address, the assumption would have no relevance in this appeal. By approving the Camden plan, the State Treasurer has established a minority hiring goal for the City of Camden that operates no differently than every other minority hiring goal established by the State Treasurer pursuant to *N.J.S.A.* 10:5-36. The Council's constitutional challenge to the Camden minority hiring goal must therefore be interpreted as a challenge to the State Treasurer's general power to issue affirmative action hiring goals. *N.J.A.C.* 17:27-7.3.

We begin with the premise that the Camden minority hiring goal, like the 21 county-wide hiring goals promulgated by the State Treasurer, *N.J.A.C.* 17:27-7.3, is not a fixed quota. The ordinance does not mandate that the contractor hire 25% minority workers, but only that the contractor "make every effort to meet the [goal]." Appellant's contrary reading of the ordinance is not correct.[7]

7. In arguing that the Camden ordinance establishes an unconstitutional quota, appellant points to language in the ordinance

The ordinance's criteria for good faith compliance confirm that the hiring goals are not immutable quotas. At oral argument, the Department of Treasury made clear that it regarded the ordinance as establishing goals, not quotas. The Camden city attorney expressed no contrary opinion.

There is substantial precedent for mandating affirmative action by recipients of government contracts. The minority hiring goals in this case are less stringent than the State of New Jersey requirements for affirmative action in public contracting approved 11 years ago by a Federal District Court in *Joyce v. McCrane*, 320 *F.Supp.* 1284 (D.N.J. 1970). *Joyce* upheld the "Newark Plan," an affirmative action program promulgated by the State Treasurer pursuant to Federal Executive Order No. 11246 (1965) and New Jersey Executive Order No. 21 (1965). Executive Order No. 11246 required all contractors and subcontractors in federally financed projects to take affirmative action to see that applicants were not discriminated against on the basis of race, creed, color or national origin. In order to receive federal funds for a state medical school construction project, the State Treasurer promulgated an affirmative action plan setting up goals of 30% to 37% hiring of minority journeymen. As in this case, contractors faced no absolute quotas but faced sanctions if they failed to

7. (Cont'd.)

that although the hiring goals pertain to "every union/workman level," "in no event may the total man-hours worked" by minority members be less than the annual goals. We interpret this language to mean that although the contractor should attempt to hire at least 25% minority workers for each type of job involved in the project, in no event shall the *total* workforce be less than 25% minority workers, unless the contractor has been unable to meet the 25% goal after satisfying all criteria for good faith compliance. Any other interpretation would render superfluous the ordinance's repeated references to hiring "goals" and the criteria for measuring "good faith" compliance.

make a good faith effort at compliance. Judge Fisher approved of the Newark plan, expressly noting that hiring goals and not quotas were at issue.

> [T]he objectors to the implementing plan insist that it sets up "quotas" and is therefore invalid; however, the Plan merely sets up goals for minority employment. Sanctions cannot be imposed under the Plan if the contractors strive to meet these goals and fall short.
>
> [320 *F.Supp.* at 1291]

Similar hiring requirements placed upon public works contractors have been upheld by federal courts in cases which the Supreme Court declined to review. *See, e.g., Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 *F.*2d 159 159 (3rd Cir.), *cert.* den., 404 *U.S.* 854, 30 *L.Ed.*2d 95 (1971) (upholding the "Philadelphia Plan," requiring "every good faith effort" to meet hiring goals in six construction industry trades); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 490 *F.*2d 9 (1st Cir. 1973), *cert.* den., 416 *U.S.* 957, 40 *L.Ed.*2d 307 (1974) (upholding the "Boston Plan" which required "a not less than twenty percent ratio of minority employee man hours to total employee man hours").

The above-mentioned affirmative action plans differ from the State Treasurer's plan in that they were promulgated pursuant to federal mandate, specifically the Civil Rights Act of 1964 and Executive Order 11246. Here the State Treasurer has acted pursuant to state legislation. *N.J.S.A.* 10:5-31 to 38. However, the states have no less constitutional authority than the federal government to remedy identified past discrimination. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo,* 424 *U.S.* 1, 93, 46 *L.Ed.*2d 659, 730 (1976). The

discussion in *University of California Regents v. Bakke*, 438 *U.S.* 265, 57 *L.Ed.*2d 750 (1978), draws interchangeably from precedent involving Fourteenth Amendment challenges to state enactments and Fifth Amendment challenges to federal measures. *Compare Bakke, supra*, 438 *U.S.* at 291-310, 57 *L.Ed.*2d at 771-84 (Fourteenth Amendment challenge to state medical school admissions program), *with Fullilove v. Klutznick*, 448 *U.S.* 448, 480-89, 65 *L.Ed.*2d 902, 925-31 (1980) (Fifth Amendment challenge to Public Works Employment Act of 1977).

Fullilove v. Klutznick, supra, should lay to rest any doubts about the validity under the United States Constitution of state-imposed affirmative action requirements. In *Fullilove*, the United States Supreme Court approved the use of racial quotas as a remedy for past discrimination in general. The Court held that the remedy of affirmative action quotas need not be limited to cases of discrimination by a particular employer. *Fullilove* involved the "minority business enterprise" [MBE] provision of the federal Public Works Employment Act of 1977, 91 *Stat.* 116, which required a "10 per cent set-aside" of federal funds for minority businesses in state and local public works projects. The Court rejected the constitutional challenge that the MBE program "impermissibly deprives non-minority businesses of access to at least some portion of the government contracting opportunities generated by the Act." 448 *U.S.* at 484, 65 *L.Ed.*2d at 928. Although no single opinion commanded a majority, seven justices agreed that racial classifications are a permissible means of remedying the present effects of past discrimination, even though the present parties are innocent of discrimination. *See* Note, *The Supreme Court, 1979 Term*, 94 *Harv.L.Rev.* 125, 128 (1980).

The Council seeks to distinguish *Fullilove* on the grounds that no specific legislative or administrative find-

ings of past discrimination accompanied passage of the amendments to the Law Against Discrimination, *L.* 1975, *c.* 127, or promulgation of the State Treasurer's affirmative action rules, *R.* 1977, *d.* 364. Noting that the Supreme Court "has never approved race-conscious remedies absent judicial, administrative or legislative findings of constitutional or statutory violations," *Fullilove*, 448 *U.S.* at 497, 65 *L.Ed.*2d at 936 (Powell, J., concurring), appellant contrasts the legislative history accompanying the federal Public Works Employment Act upheld in *Fullilove* with the absence of such a legislative history in this case.

But the Court made clear in *Fullilove* that limited findings of past discrimination accompanying any particular enactment should not blind a court to other evidence of past discrimination which supports remedial legislation. Thus, the United States Supreme Court rejected the argument that Congress had made insufficient findings of past discrimination before passing the Public Works Employment Act. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action." 448 *U.S.* at 503, 65 *L.Ed.*2d at 940 (Powell, J., concurring).

The legislation here was passed ten years after Governor Hughes issued Executive Order 21 to promote equal opportunity in State employment and State public works contracting. Like Executive Order 11246, its federal counterpart, the Governor's order was a clear response to past discrimination in the construction industry. The basis for the remedy of affirmative action in New Jersey public works projects was described thoroughly by the federal district court in *Joyce v. McCrane, supra.* Numerous studies have made New Jersey legislators and administrators aware of the under-representation of minor-

ity workers in the construction industry. *See, e.g.*, Office of Federal Contract Compliance, *Report of the Panel on Equal Employment Opportunities in the Construction Trades in Newark, New Jersey* (1970).

Only by making itself obvious to the well-documented history of minority under-representation in the construction trades in this State could the Court invalidate the challenged legislation and affirmative action rules on the basis of insufficient findings of past discrimination. It is one thing to dispense justice wearing the proverbial blindfold to ensure impartiality. It would be quite another matter to wear blinders blocking out the manifest evidence of past discrimination which underlies this remedial legislation.

The Council seeks additional support for its constitutional challenge in Article 1, par. 5 of the New Jersey Constitution and *Lige v. Town of Montclair*, 72 *N.J.* 5 (1976). In *Lige* we struck down the use of hiring and promotion quotas to remedy past discrimination by a local police and fire department. *Lige* involved a finding that the Town of Montclair used an employment exam that had a "disproportionately negative effect on blacks." Because the town did not offer sufficient evidence to establish that the tests were job related, the resulting presumption of discrimination was not rebutted.

Pursuant to its authority under *N.J.S.A.* 10:5-17, the Division of Civil Rights ordered that the town adopt a quota system requiring one minority fire fighter to be hired for every white applicant hired until there were at least 15 minority officers. A similar remedy affecting police department promotions was also ordered. The Appellate Division reversed the orders, 134 *N.J.Super.* 277, and the Supreme Court affirmed, holding that the remedial order violated the state constitutional rights of non-minority applicants for Montclair police and fire jobs and promotions.

The decision and the reasoning in *Lige* focused on the unfairness of rigid quotas. However, where minority hiring *goals* and not *quotas* are involved, the concerns behind the Court's result in *Lige* are not present. *Lige* struck down the Civil Rights Division's hiring and promotion quotas because they were "a rejection of the concept that the more or most qualified should be hired and promoted . . . It is the racial classification irrespective of qualification that mandates its invalidation." 72 *N.J.* at 22, 23.

While the State Treasurer's affirmative action requirements strongly encourage minority hiring, they do not require the contractor to hire non-qualified employees or to disregard meaningful differences in employee qualifications. The regulations require only that the contractor make a good faith effort to attain the minority hiring goal. Moreover, there is absolutely no indication that the hiring goals have operated, or will operate, to place less qualified employees in public works contracts. We note that no contractors engaged in public work, whose businesses would be most directly affected by having to hire less qualified employees, have sought to intervene in this suit.

Justice Schreiber was careful to note in *Lige* that the State need not be color-blind in its attempts to promote equal employment opportunity. 7, *N.J.* at 25 ("For example, . . . the Town might attempt to obtain more qualified black candidates by alerting black students in colleges and recent high school graduates of the job opportunities."); *see also* 72 *N.J.* at 53 (Pashman, J., dissenting). In *Morean v. Bd. of Montclair*, 42 *N.J.* 237 (1964), the Court sustained a plan for the transfer and assignment of pupils within a school district, although the proposal was admittedly racially motivated and avowedly sought to control racial balance as among the several junior high schools. And in *New Jersey Builders Ass'n v. Blair*, 60 *N.J.* 330

(1972), we unanimously affirmed the validity of a rule requiring owners of multiple dwellings to facilitate compliance with the Law Against Discrimination by filing annual reports disclosing rentals and requiring racial identification of tenants. Justice Mountain there approvingly cited the "Philadelphia Plan" case, *Contractors Ass'n of Eastern Pa., supra,* which, as described above, upheld a minority hiring plan similar to the plan at issue here.

Moreover, *Lige,* in discussing Title VII of the Federal Civil Rights Act of 1964, referred to a federal Court of Appeals case limiting use of racial quotas to instances where there has been

> "a clear-cut pattern of long-continued and egregious discrimination," and the effect of the reverse discrimination . . . [is] not . . . "identifiable," namely, that it is not concentrated on a relatively small group of non-minority persons.
>
> [72 *N.J.* at 19, quoting *Kirkland v. New York State Dept. of Correctional Serv.*, 520 F.2d 420, 427 (2d Cir.), *reh, en banc* den., 531 F.2d 5 (2d Cir. 1975)]

Both *Kirkland* and *Lige* preceded the United States Supreme Court opinion in *Fullilove v. Klutznick,* where the high Court for the first time approved of racial quotas under circumstances analogous to those in this case where the remedy is imposed throughout an entire industry rather than upon a particular employer.

The *Fullilove* opinion recognizes that past discrimination has placed non-minorities in a better position, and the victims of discrimination in a worse position, than each would have been in a color-blind society. Affirmative action is designed to remedy that systematic unfairness. We held in *Lige* that affirmative action in the form of a rigid

racial quota offends the State Constitution. Quotas are not at issue in this case. We hold today that the State Treasurer's minority hiring goals for affirmative action in public contracting, including approval of the 25% Camden City goal, violate neither the United States nor the New Jersey Constitution. Minority hiring goals with criteria for good faith compliance are a proper means of ensuring that contractors will take affirmative action to promote equal opportunity in an industry where minorities have been severely under-represented.

C. *Constitutionality of Resident Hiring Quotas for Local Public Works Projects.*

Appellant attacks the portion of the Camden affirmative action plan that requires that 40% of all persons hired for city public works projects be city residents, claiming violations of the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause. Conceding that municipalities can constitutionally require that their employees be city residents, *see McCarthy v. Philadelphia Civil Service Comm'n*, 424 *U.S.* 645, 47 *L.Ed.*2d 366 (1976) (upholding Philadelphia ordinance requiring city employees to be city residents); *Detroit Police Officers Ass'n v. Detroit*, 385 *Mich.* 519, 190 *N.W.*2d 97 (1971), appeal dismissed for lack of substantial federal question, 405 *U.S.* 950, 31 *L.Ed.*2d 227 (1972) (upholding residency requirement for police officers); *Abrahams v. Civil Service Comm'n*, 65 *N.J.* 61 (1974) (upholding residency requirement for Newark city employees), appellants distinguish this case as involving the imposition of hiring quotas upon private contractors. While appellant's characterization of the Camden ordinance is accurate, we do not agree that the distinction deprives the ordinance of its constitutional validity.

1. *The Commerce Clause*

Although the Commerce Clause speaks only in broad terms of giving Congress authority to "regulate commerce . . . among the several states," *U.S. Const.*, Art. I, sec. 8, the Supreme Court has often invoked the clause to strike down state legislation that unreasonably impedes the flow of commerce across state lines. *See, e.g., Toomer v. Witsell*, 334 *U.S.* 385, 92 *L.Ed.* 1460 (1948) (invalidating a South Carolina requirement that shrimp boats fishing off its coast dock in the state and pay taxes on their catches before transporting them interstate); cases collected in *Hughes v. Alexandria Scrap*, 426 *U.S.* 794, 805-06, 49 *L.Ed.*2d 220, 229 (1976). The Supreme Court has applied the Commerce Clause to municipal enactments that unreasonably burdened interstate commerce. *See Dean Milk Co. v. Madison*, 340 *U.S.* 349, 95 *L.Ed.* 329 (1951) (striking down a city ordinance barring the sale of milk unless processed at an approved pasteurization plant within five miles of the city).

All of the leading cases invalidating state and local legislation under the Commerce Clause, however, involve state taxes and regulatory measures impeding *private* trade in the national marketplace. *See H.P. Hood & Sons v. Du Mond*, 336 *U.S.* 525, 539, 93 *L.Ed.* 865 (1949) (referring to state "home embargoes," "customs duties" and "regulations" excluding imports). In this case, the City of Camden is not regulating the flow of commerce between private parties. The city is acting in the role of market *participant*, not market *regulator*. This distinction is crucial for purposes of Commerce Clause analysis. In *Hughes v. Alexandria Scrap, supra*, the United States Supreme Court determined that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market

and exercising the right to favor its own citizens over others." 426 *U.S.* at 810, 49 *L.Ed.*2d at 231. *Alexandria Scrap* concerned a Maryland program designed to remove abandoned automobiles from the state's roadways and junkyards. The state's requirements for vehicle documentation made it effectively impossible for out-of-state processors to sell abandoned automobiles to the state. Nonetheless, the Court upheld the statute, stating that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur," *id.* at 806, but rather it has entered the market as a purchaser and restricted "its trade to its own citizens or businesses within the State." *Id.* at 808.

In *Reeves, Inc. v. Stakes*, 447 *U.S.* 429, 65 *L.Ed.*2d 244 (1980), the Court reaffirmed its approach giving the States broad power to prefer their own citizens when acting as market participants. The Court held that the South Dakota Cement Commission did not violate the Commerce Clause by its decision to give state buyers an absolute preference in fulfilling their requirements for cement in times of shortage. The Court noted,

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. . . . Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer . . . to exercise his own independent discretion as to parties with whom he will deal."
>
> [447 *U.S.* at 436, 439 (citations and footnote omitted)]

This Court has endorsed the principle that the state as market participant has freedom to favor its own citizens

and choose the parties with whom it will deal. In *K.S.B. Tech. Sales v. No. Jersey Dist. Water Supply*, 75 *N.J.* 272, 298 (1977), Justice Schreiber, writing for a unanimous Court, noted that a state's "purchase of goods and materials for its own end use . . . is not subject to the usual Commerce Clause restrictions." The Court upheld a statute requiring contractors with state and local government to buy only American products. *Cf. McGlynn v. N.J. Public Broadcasting Auth.*, — *N.J.* — (1981) (federal communications law does not preempt state rules ensuring candidate access to a state-owned television station where State is acting in its role as proprietor of the State's public stations).

There is no question that if the City of Camden were engaged in its own public works construction, it could require that all employees on the job be city residents. When the government decides to purchase those services rather than perform them itself, it retains constitutional power to prefer its own citizens, at least to some extent. *See McCarthy, supra; Abrahams, supra.* The decision of South Dakota to prefer its own citizens as purchasers in time of emergency shortage is particularly apposite to the instant case. We have recently described the severe economic plight that has befallen the City of Camden. *City of Camden v. Skokowski*, — *N.J.* — (1982). It is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their social ills.

We are aware of the recent decision of the Supreme Judicial Court of Massachusetts invalidating resident hiring quotas for Boston public works projects. *Mass. Council of Construction Employers v. Mayor of Boston*, — *Mass.* —, 425 *N.E.*2d 346 (1981), *cert.* granted *sub. nom. White v. Mass Council of Construction Employees*, — *U.S.* —

(1982). The Massachusetts court relied almost entirely on *Hicklin v. Orbeck*, 437 *U.S.* 518, 57 *L.Ed.*2d 397 (1978). *Hicklin* involved the "Alaska Hire" law, a state statute requiring that all Alaskan oil and gas leases, easements and other related agreements contain a requirement that qualified Alaska residents be given preference in hiring. Because the law applied to *"all employment which is a result of* oil and gas leases," it "extend[ed] to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State." 437 *U.S.* at 529-30, 57 *L.Ed.*2d at 407 (emphasis in original). In short, the state in *Hicklin* was acting in its role as market regulator rather than market participant. We find unpersuasive the Massachusetts court's adaption of the reasoning of *Hicklin* to the context of the Commerce Clause, particularly in light of the Supreme Court holding in *Reeves, Inc. v. State, supra.*

As the Supreme Court noted in *Reeves*, "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." 447 *U.S.* at 439, 65 *L.Ed.*2d at 253. Given these factors, the Court concluded, "the adjustment of interests in this context is a task better suited for Congress than this Court." *Id.* We concur in the high Court's reasoning, and we uphold the constitutionality of the Camden resident quota, with the understanding that our Legislature is free to determine that the "competing considerations" militate against allowing municipalities to prefer their own residents for public works contracting.

2. *The Privileges and Immunities Clause.*

Unlike the Commerce Clause, the Privileges and Immunities Clause speaks explicitly in terms of affording con-

stitutional protection against the actions of other States. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *U.S. Const.* Art. IV, sec. par. 1.

The purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v. Orbeck*, 437 *U.S.* 518, 524, 57 *L.Ed.*2d 397, 403 (1978), quoting *Paul v. Virginia*, 8 *Wall.* 168, 180, 19 *L.Ed.* 357 (1869).

For this reason the clause is not invoked to strike down local ordinances that favor city residents. Clearly, the Camden affirmative action plan does not aim primarily at out-of-state residents. It most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect "the States . . . treatment of each other's residents," *Hicklin, supra*, 437 *U.S.* at 523, 57 *L.Ed.*2d at 403, it does not violate any privilege of state citizenship.

In *Mass. Council of Employers, supra*, the Massachusetts high Court rejected the privileges and immunities attack on Boston's resident quota in public works contracts "because the discrimination adversely affects citizens of the Commonwealth as well." 425 *N.E.*2d at 354.[8] This Court likewise declines to apply the Privileges and Im-

8. The Massachusetts court in *Mass. Council*, and the New York Court of Appeals in *Salla v. County of Monroe*, 48 *N.Y.*2d 514, 399 *N.E.*2d 909 (1979), did however invoke the Privileges and Immunities Clause to strike down statutes that gave hiring preferences in public works contracts to all citizens of their *respective* states.

New Jersey's mandatory preference for State citizens in public works contracts, *N.J.S.A.* 34:9-2, was held violative of the Privileges and Immunities Clause by Judge Dreier in *Neshaminy Constructors, Inc. v. Krause*, 181 *N.J.Super.* 367 (Ch.Div. 1981).

munities Clause in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality.

3. *The Equal Protection Clause.*

Appellant contends that the Camden resident hiring quota offends the Equal Protection Clause by infringing upon the fundamental right to travel recognized in *Shapiro v. Thompson*, 394 *U.S.* 618, 22 *L.Ed.*2d 600 (1969). The Court rejects appellants' challenge for the same reasons that the Court has rejected equal protection attacks on the power of municipalities to hire only their own residents as city employees.

Residency requirements for municipal employees have almost universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare. *See McCarthy, supra;* Note, *Municipal Residency Requirements and Equal Protection*, 84 *Yale L.J.* 1684 (1975). In *Kennedy v. City of Newark*, 29 *N.J.* 178 (1959), Chief Justice Weintraub described the constitutional justification for residency requirements:

> * * * Government may well conclude that residence will supply a stake or incentive for better performance in office or employment and as well advance the economy of the locality which yields the tax revenues. [29 *N.J.* at 184]

The Supreme Court's recognition of the right to travel as a "fundamental right" in *Shapiro v. Thompson*, 394 *U.S.* 618, 22 *L.Ed.*2d 600 (1969) (striking down one-year durational residency requirements for welfare benefits), created doubts as to the validity of *Kennedy v. City of Newark*. But this Court explicitly rejected the "right to travel" argument in again upholding Newark's employee

residence requirement in *Abrahams v. City of Newark, supra.*

The right to employment on a local public works project, like the right to a city job, is not fundamental for purposes of equal protection analysis. Therefore, discrimination against non-residents of Camden does not offend the Equal Protection Clause if it has a rational basis. *Allied Stores of Ohio v. Bowers,* 358 *U.S.* 522, 528, 3 *L.Ed.*2d 480 (1959). The rational reasons for a city's decision to hire its own residents in direct employment, discussed by Chief Justice Weintraub in *Kennedy v. City of Newark, supra,* apply just as forcefully in the context of city contracting for public works projects. The severe unemployment in Camden and the need for economic revitalization, noted by this Court in *City of Camden v. Skokowski, supra,* further support the rationality of resident hiring quotas. The 40% resident hiring quota for Camden public works thus does not offend the Equal Protection Clause.

D. *State Preemption of the Camden Resident Hiring Quota.*

This Court's approach to state preemption parallels the federal analysis. When a state statute has preempted a field by supplying a complete system of law on the subject, an ordinance dealing with the same subject is void. *Ringlieb v. Parsippany-Troy Hills Tp.,* 59 *N.J.* 348 (1971) (State regulation of solid waste disposal); *Summer v. Teaneck,* 53 *N.J.* 548 (1969) (ordinance designed to prevent blockbusting); *Mogolefsky v. Schoem,* 50 *N.J.* 588 (1967) (licensing of real estate brokers). A legislative intent to preempt the field need not be expressly stated. "[W]here a legislative enactment, either expressly or impliedly, is intended to be exclusive in the field, preemption will be found," *Garden State Farms, Inc. v. Mayor Louis Bay, II,* 77 *N.J.* 439, 450 (197[illegible]).

However, Art. IV, sec. 6, par. 11 of the *N.J. Const.* mandates a liberal construction of legislation in favor of local authority. Therefore, a legislative intent to supersede local powers must clearly be present. *Kennedy v. City of Newark*, 29 *N.J.* 178, 187 (1959). As explained by former Chief Justice Weintraub,

> The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.
>
> [*Summer v. Teaneck*, 53 *N.J.* 548, 555 (1969)]

In this case no statute expressly precludes the 40% resident hiring quota that Camden has imposed upon public works contractors. Moreover, the Legislature clearly has not preempted the field in the area of local residency requirements, having given local governing bodies discretion regarding the use of residency requirements for officers and other employees. *N.J.S.A.* 40A:9-1.3. The appellant Council therefore must argue that the Legislature has impliedly preempted the field by expressing a clear intent not to allow municipalities to place hiring restrictions on public works contractors. The Council's argument has two separate thrusts, relying both on residency requirement statutes and on the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 to 40. Both arguments are unconvincing.

The Council argues that in granting a preference for all "citizens of the state of New Jersey" in public works contracts for the state and its subdivisions, *N.J.S.A.* 34:9-2, the Legislature clearly intended to preclude local resident quotas, since the quotas work against citizens of New Jersey who live outside of the locality that has enacted

the quota. The implication that appellant seeks to draw is simply too tenuous. All Camden City residents are also New Jersey residents. In no way, therefore, does the Camden resident quota frustrate the Legislature's purpose of maximizing the employment of New Jersey residents in state and local public construction.

Likewise, the contention that the Legislature clearly intended to preclude the Camden resident quota because it has explicitly provided for residency requirements in direct local hiring, *N.J.S.A.* 40A:9-1.3, but not in local public works contracting, is weak. A similar argument was rejected by this Court in *Kennedy v. City of Newark, supra.* There the petitioner argued that because a state statute required residency of municipal officers, but not of municipal employees, the City of Newark was precluded from placing a residency requirement upon city employees who were not officers. 29 *N.J.* at 186. The Court found no evidence of an intent to preempt the Newark ordinance by implication. *Id.* at 186-87.

The lack of legislation concerning local resident quotas in public works contracting is natural, given that such requirements have rarely if ever been enacted in this State. The Legislature of course has the authority to forbid or to regulate local resident quotas such as that enacted by the City of Camden. There is no indication, however, that the Legislature has already chosen to do so.

Appellant contends also that the Camden resident quota is preempted by Section 13 of the Local Public Contracts Law. *N.J.S.A.* 40A:11-13. That statute prevents municipalities from imposing specifications upon private contractors "not directly related to the purpose, function or activity" for which the contract is made. *N.J.S.A.* 40A:11-13(a). The statute also expressly precludes the

requirement that any bidder be a resident of the city or county in which the contract will be performed. *N.J.S.A.* 40A:11-13(b). The law's explicit purpose is to encourage open and competitive bidding.

There is no indication that the Camden resident hiring quota has disrupted, or will in any way disrupt, the competitive bidding for Camden public works contracts. Unlike the affirmative action ordinance invalidated in *Arington v. Associated Gen. Contractors,* 403 So.2d 893 (Ala. 1981), which required that at least 10% of each contract amount be spent with minority subcontractors or suppliers, the Camden ordinance does not exclude any contractor, subcontractor or supplier from any work awarded by the city, provided that the affirmative action requirements are followed. Although it is possible that some contractors with permanent work crews will refrain from bidding on Camden public works projects, the record contains absolutely no evidence to support that assumption. Our State Constitution mandates a liberal construction of legislation in favor of local authority. Art. IV, § 7, par 11. The Court will not override this constitutional power based on mere speculation.

Appellants thus have made no showing that any state legislation preempts the 40% resident hiring quota in the August 1980 City of Camden ordinance.

III

In approving the Camden affirmative action ordinance, the State Treasurer did not act outside the scope of his statutory authority under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to 38. Neither was his approval an abuse of administrative agency discretion. The State Treasurer's minority hiring goals, including the 25% goal for the City of Camden, do not violate the Equal Protection Clause. The 40% resident hiring quota for Camden public works

projects is also constitutional and is not preempted by state statute. We therefore affirm the decision of the Chief Affirmative Action Officer of the Department of Treasury in approving the Camden affirmative action plan pursuant to *N.J.A.C.* 17:27-6.5. Other relief sought by appellant is denied.

Chief Justice Wilentz and Justices Clifford, Schreiber, Handler, Pollock and O'Hern join in this opinion.

APPENDIX B

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-79
SEPTEMBER TERM, 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

TO: Stephen W. Townsend
Clerk, Supreme Court of New Jersey
CN970

Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the United Building and Construction Trades Council of Camden County and Vicinity, the appellant above-named, hereby appeals to the Supreme Court of the United States from that portion of the final judgment of the Supreme Court of the State

of New Jersey, which upheld the constitutionality of a municipal ordinance requiring at least 40 per cent of the employees hired by private contractors engaged in public works construction projects with the City of Camden, be municipal residents for one year prior to employment. The judgment in this action was entered on February 18, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

BY: /s/ STEVEN K. KUDATZKY
STEVEN K. KUDATZKY
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Attorneys for Appellant
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100

Dated: April 22, 1982

Certificate of Service

I hereby certify that one copy of this Notice of Appeal to the Supreme Court of the United States was mailed on this date, by first class mail, postage prepaid, to all of the parties listed below:

Lawrence E. Rosoff, Esquire
City Attorney for the City of Camden
Department of Law
City Hall
Camden, New Jersey 08101

Irwin I. Kimmelman, Esquire
Attorney General of New Jersey
CN080
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

I further certify that all parties to be served with this Notice of Appeal have been served.

BY: /s/ STEVEN K. KUDATZKY
STEVEN K. KUDATZKY
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Attorneys for Appellant
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100

Dated: April 22, 1982

APPENDIX C

JJL:db
7-24-80

Ordinance MC 1650 Adopted August 28, 1980

AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN

WHEREAS, the City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and

WHEREAS, the City Council of the City of Camden in viewing the present economic conditions which confront minority citizens within the City of Camden and said minority citizens make up a significant portion of the population of the City of Camden; and

WHEREAS, the present economic conditions nationwide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and

WHEREAS, the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, un-

employment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave than that which existed when the figures were compiled; and

WHEREAS, the City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

WHEREAS, the City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; now, therefore

BE IT ORDAINED by the City Council of the City of Camden, as follows:

I. *Definitions*

For the purpose of the contract or grant, unless the context indicates a different meaning:

1. Developer/Contractor means any party performing or offering to perform a contract for public construction in the City of Camden.

2. Minority includes persons who are either Black, Hispanic or women, as those terms are defined herein:

(a) Black: All persons having origins in any of the Black racial groups of Africa.

(b) Hispanic: All persons of Mexican, Puerto Rican, Cuban, Central or South American origin, regardless of race.

(c) Women: All Females.

(d) Asians and American Indians.

3. Minority-owned business or minority-owned business enterprise means any business enterprise of which a minimum of 51% of the beneficial interest in such business enterprise is held by individuals who are members of a minority, as defined above, and that a minimum of 51% of the net profit or loss is attributable to such minority members, and which is certified by the Affirmative Action Review Council as such. For the purpose of qualifying as a certified minority-owned business enterprise, a spouse is deemed to be the owner of the other spouse's beneficial interest in a business enterprise.

4. Sub-contractor means any contractor who takes a portion of a contract from a developer/contractor or another sub-contractor.

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence.

II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or

where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply, except as provided in Section XII. The Director of the appropriate City Department granting or letting the contract will advise the appropriate state and federal agencies and officials of the standards set forth under this ordinance and request compliance with this ordinance. The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or less.

III. *Establishment of a Camden Affirmative Action Review Council*

In order to facilitate the implementation of this ordinance, there shall be established an Affirmative Action Review Council.

a. The Affirmative Action Review Council shall consist of seven (7) members and the original composition of such Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a term of one (1) year; and, thereafter, members of such Council shall serve for a term of two (2) years.

b. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The appointing authority shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractor's associations, government and the minority community.

c. Members of the Affirmative Action Review Council may be removed for non-performance or neglect

of duties or for other good cause by the Mayor with the advice and consent of the majority of City Council, or may be removed by an affirmative vote of two-thirds of the City Council.

d. Members of the Affirmative Action Review Council shall serve without compensation.

e. Vacancies in the Affirmative Action Review Council, for whatever reason, shall be filled in the manner herein provided for new appointments.

f. The Affirmative Action Review Council shall adopt appropriate rules and procedures for the regulation and conduct of their meetings.

IV. *Developer/Contractor's Contracting Obligations*

a. The developer/contractor to whom this ordinance is applicable, shall submit to all contractors and sub-contractors copies of this ordinance and shall make compliance with it, a specification of all bids. The developer/contractor shall require that by submitting a bid, a contractor or sub-contractor certifies that he/she will comply with the requirements of this ordinance.

b. The developer/contractor, in engaging individuals for employment, shall make every effort to fulfill the purpose of this ordinance by engaging for employment as many residents of the City of Camden as is reasonable and practicable to fulfill the purpose of this ordinance and to complete the designated construction project.

c. The developer/contractor shall make every effort to employ not less than 25% minority workers in the utilization of all trades, as tradesmen, journeymen and apprentices, in performance of his/her contract, whether or not the work is sub-contracted.

The above goal is expressed in terms of man-hours to be worked by minority members in each trade and at every union-workmen level or equivalent; however, in no event may the total man-hours worked by minority members during the performance of the contract be less than the annual goals established above.

d. The developer/contractor shall ensure that any sub-contractor working on any part of the project under the sub-contract exceeding $25,000.00 and involving man-hours in excess of eighty (80) hours, shall have 10% of all journeymen hours worked by minority apprentices in each trade. This shall apply to all specialty trades or craft unions, but not limited to pneumatic tubing, cabinet makers/finishers, heating/electrical temperature controllers and curb and sidewalk installers.

e. In the event a developer/contractor or subcontractor does not meet the requirements and goals established in this section, the criteria for measuring good faith compliance contained in Section XI(a), shall apply.

f. The collective bargaining agreements between the various contractors and sub-contractors and their various unions shall remain in force and effect. Any preexisting contract which would, by its terms, preclude compliance with the terms of this ordinance shall not, in and of itself, serve as the basis or justification for non-compliance.

g. The general contractor or sub-contractor will notify the Camden Affirmative Action Officer whenever he has reason to believe that any union which has a hiring hall or referral arrangement or an apprenticeship program engages in such referral, membership, admission or other practices as will substantially impede the contractor in his efforts to meet his Affirmative Action obligations, under this ordinance.

h. The contractor and each sub-contractor whose contract(s) exceeds $25,000.00, shall develop and submit a Manning Table. This document shall identify his estimated manpower requirements for the duration of the job broken down by trade and month. The manning of the job shall be related to this document which shall be brought up to date as required, but not less than once monthly.

i. The contractor shall submit copies of his collective bargaining agreement covering workers to be employed on the project, and copies of such bargaining agreements of each sub-contractor.

j. The contractor shall designate a principal officer of his firm to be responsible for administering the Affirmative Action Program detailed herein. This officer shall meet regularly, or as may be required, with the Affirmative Action Officer for Camden and/or the Review Council to ensure attainment of the goals set forth herein and the implementation of the training program. Included in this obligation is the requirement that each sub and prime contractor keep and maintain records for all trainees so that separate payroll amounts and descriptions of payments, training progress, together with all benefits, are recorded separately.

V. *Pre-Award Conference*

At the pre-award, prior to award, the apparent low bidder and the known principal sub-contractors, including, but not limited to, those performing major items of work such as heating, electrical, plumbing, etc., will be required to attend a pre-award conference with the City's Affirmative Action Program relating to Equal Employment Opportunity as provided in the information to bidders.

At the pre-award conference, an evaluation will be made of the adequacy of the contractor's plan as outlined in the pre-award documents.

The evaluation of the contractor's plans shall demonstrate his commitments to:

a. Cooperate with the unions with which the contractor has agreements in the development of programs to assure qualified members of minority groups of equal opportunity in employment in the construction trades.

b. Improve opportunities for the upgrading of the minority group members of the construction force.

c. Actively seeks union membership for qualified minority members of the construction force.

d. Make certain that all recruiting activities are carried out on a non-discriminatory basis.

e. Make known to all of the sub-contractors, employees and sources of referral, its equal employment oportunity policy.

f. Encourage minority group sub-contractors to bid for sub-contracting work.

g. Demonstrate how minimum requirements, as set forth in the within ordinance, will be met.

h. Any contract that would implicitly preclude compliance with the terms of the within ordinance shall not be considered within this context.

VI. *Reporting Requirements*

a. The contractor must submit the contractor's weekly payroll records for all crafts covered under the contract provisions. In addition, a monthly cumulative summary of project man-hours must be provided on a

craft-by-craft basis and identify as to minority or non-minority status.

b. The contractor will permit access to weekly certified payroll records for all crafts covered under the contract provisions.

c. The contractor will, on the last working day of each month, report to the City of Camden's Affirmative Action Officer, a written narrative of his efforts to ensure compliance with this ordinance. The report will include an appraisal as to the effectiveness of the contractor's program and will specify those factors and conditions which impede, restrict or account for less than complete success of the program.

Contractor Monitoring. The contractor shall continually monitor all personnel activities to ensure that the Affirmative Action Program is being carried out.

Criteria for Measuring Good Faith:

a. The contractor will consider for employment journeymen, basic trainees, advanced trainees and apprentices, persons referred to him by any training source approved by the Review Council. If the contractor does not employ any person so referred, he shall submit a written explanation by close of day to the Review Council.

b. Opportunities for minority participation in proposed projects will be submitted to the Affirmative Action Review Council who shall place notifications in area publications, including minority publications and non-profit minority organizations.

c. Information shall be supplied to all minority organizations who seek said information by request directed to the Affirmative Action Review Council.

d. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the contractor, as employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

e. If monitoring reveals significanct non-compliance, the Affirmative Action Review Council will examine attempts at compliance measured by the criteria set forth under Section IV and Section VI of this ordinance and attempt to reach an amicable agreement within the parameters of this ordinance. Continued non-compliance, and a lack of an amicable solution thereto, shall result in a referral of the matter to the Department of Administration.

VII. *Union Statements*

When a contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such contractor shall submit with his/her bid a statement signed by an authorized union official, in which the union agrees as follows:

1. Said union is aware of the terms, conditions and goals of the within ordinance.

2. Said union is aware of the position of the City of Camden as the third party beneficiary with regards to the right to recover monetary damages on behalf of those adversely affected by non-compliance with the within ordinance.

3. Said union shall make a good faith attempt to assist the contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance. The contractor will

promptly notify the developer and the Review Council of any failure on the part of a union to comply with the provisions of the above described statement. If a union has refused to sign the statement described above, the contractor will document his/her efforts to obtain such statement, including a description with the reasons given by the union for not signing such statement, and submit such documentation, together with his/her bid. A bid shall be deemed unresponsive if unaccompanied either by an acceptable union statement or by documentation as to why such statement could not be obtained. In addition, the award of a contract or a sub-contract will not be approved if such contractor has not submitted an acceptable union statement, or an explanation of the failure to obtain a statement. The failure of the union to sign the statement described above does not excuse the contractor from his/her obligation to comply with the conditions and provisions of this ordinance.

VIII. *Sub-contractors*

The developer shall require that each prime contractor is responsible for the performance of his sub-contractors in the implementation of the aforementioned equal employment requirements during the performance of the contract. Whenever the contractor sub-contracts a portion of the work on the project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he were the contractor. Furthermore, the contractor must include a provision in all contracts with sub-contractors to ensure compliance with all other conditions included herein, as well as with the New Jersey Executive Order 21 and *N.J.S.A.* 10:2-1 through *N.J.S.A.* 10:2-4, the President's Executive Order No. 11246 (C.F.R. 12319-25), *N.J.S.A.* 10:5-31, *et seq.* and Chapter 127 of Public Laws of 1975.

IX. *Nondiscrimination*

The contractor shall not discriminate against employees and applicants for employment on the grounds of union membership or on the grounds of race, color, religion, sex, age, national origin and handicap.

X. *Non-compliance*

In the event of failure by the contractor to meet his minority manpower commitments under this ordinance, he shall be given an opportunity to demonstrate that he has made every good faith effort to meet the manpower commitments. In any proceeding in which such good faith is in issue, all of the actions of the contractor, in seeking to comply with these requirements, shall be reviewed and evaluated by the Review Council, in light of the criteria set forth in Section VII. Compliance with these conditions will be monitored by the Affirmative Action Officer employed by the City of Camden.

1. Said Affirmative Action Officer will issue a written "Alert Notice" to a contractor and to appropriate unions whenever in his opinion, a breach of the above described conditions appear to be developing.

2. If the Alert Notice is not removed within three (3) working days by a correction of the deficiencies, the Affirmative Action Officer shall follow up the Alert Notice by issuing a written "Violation Notice". Upon the issuance of such notice, the contractor will have seven (7) working days to remove the violation. If the violation has not been removed within that period, the Camden Affirmative Action Officer will make recommendations to the Review Council of action to be taken by the City of Camden.

3. Either or both notices may be removed if the contractor meets his obligations under this ordinance or

if he presents a satisfactory explanation, in writing, as to why such compliance is impractical or impossible.

4. Compliance will be monitored by the Review Council or the officer so designated to act on its behalf.

5. Failure to satisfactorily remove the Violation Notice will be cause for the City of Camden, to,

a. Require the developer/contractor to enforce his obligations under his contract with contractors and sub-contractors by litigation at law or in equity, whichever is appropriate;

b. Withhold contract or grant payments;

c. Recommend termination or suspension of the contracts in whole or in part to the City Council;

d. Take all other actions available at law or in equity for the breach of a material condition of a contract.

XI. *Minority-owned Business Enterprise—Participation On Construction Contracts*

1. On all construction contracts in excess of $50,000.00 to be awarded by the City, the contractor will agree to make a good faith effort, as that phrase is defined in this sub-section, to use minority-owned business enterprises for not less than 25% of the total contract or grant amount.

2. Any contractor who does not meet the minimum level of 25% minority participation will be given an opportunity to display the "good faith" effort made towards meeting the goals of this Affirmative Action Program. For purposes of this sub-section, "good faith" effort shall be defined to include the following:

a. Informing associations, groups and organizations of bid specifications within a reasonable time of the closing date for bid submission.

b. Actively recruiting minority business enterprises to bid on sub-contracts.

c. Limiting the size and dollar volume of sub-contracts to the extent feasible and otherwise arranging solicitations and completion dates in order to make it possible for minority business enterprises to bid and compete for said contracts.

d. Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insurance through normal channels, assuming the responsibility for meeting such requirements or otherwise making appropriate arrangements which shall eliminate these requirements as obstacles to the granting of the sub-contract to such minority business enterprise.

e. Soliciting minority participation through advertising in area publications, including minority publications.

f. Informing area non-profit minority organizations of opportunities.

g. Providing whatever other counselling or assistance as may be necessary during the preparatory stages and the actual performance of such sub-contracts.

h. Offering to assist minority business enterprises in entering into joint ventures with others for the purpose of accomplishing a total sub-contract, if they so desire.

3. In the event that the percentage of the contract and/or sub-contract work designated for minority-owned business enterprises is not at least 25% of the total

dollar volume of the contract and it is determined by the Affirmative Action Review Council that a "good faith" effort has not been made, it shall recommend to the Department of Administration and the particular department acting as the funding source, one or more of the following actions:

a. Hold a meeting of all parties to attempt an amicable resolution of the determination of non-compliance by the Council.

b. Require the contractor to comply with the terms of this ordinance through the appropriate legal action.

c. Withhold payments under any contract or grant which may be due or owing to any contractor.

d. Consider the breach of this agreement an act of irresponsibility by the contractor which the City may take into account in evaluating future bids by that contractor within the parameters of the Local Public Contract Law of the State of New Jersey, *N.J.S.A.* 40A-11-1, *et seq.*

The use of any or all of the above remedies shall rest within the discretion of the Business Administrator with the advice of any and all department heads which he deems fit. Failure to so act shall not be considered as a waiver of any provision or right contained within this ordinance.

XII. *Establishment of a Goal in Connection With the Award of Certain City Construction Contracts to Minority-Owned Business Enterprises*

a. The developer/contractor shall be ultimately responsible for assuring that 25% of the dollar cost of any contract exceeding $50,000.00 shall be awarded to a minority-owned business enterprise, as defined in this ordinance and as certified as such by the Review Council.

b. Within the parameters of the State's Public Bidding Laws, the City of Camden shall ensure that a fair and substantial portion of those publicly funded City construction contracts valued at less than $50,000.00, but in excess of $4,500.00, are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 35% of the total dollar amount of such contracts awarded annually.

c. Within the parameters of the State's Public Bidding Laws, the City of Camden shall ensure that a fair and substantial portion of publicly funded service and purchase contracts, valued at less than $4,500.00 are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 50% of the total dollar amount of such contracts awarded annually.

XIII. *Governmental Requirements*

It is expected that all contractors and/or developers will comply with any and all applicable federal or state requirements for equal opportunity, but compliance with the same shall, in no way, excuse any non-compliance with any specific requirements as set forth in the within ordinance.

SECTION 1. All ordinances or part of ordinances inconsistent with the provisions of this ordinance are hereby repealed as to such inconsistency only.

SECTION 2. At the direction of the State of New Jersey Department of Treasury and pursuant to State statute P.L. 1975, c.127, all persons who are subject to the terms and requirements of this ordinance are hereby required to meet the following standards of the State of New Jersey;

1. All contracts of $4,500.00 or more must include the mandatory contract language requirements of Subsection 3.4(a) of the Affirmative Action Regulations.

2. All advertisement and solicitation of construction contract bids must contain the following language: "Bidders are required to comply with P.L. 1975, c.127".

3. Any construction contractor or sub-contractor which submits appropriate evidence that it is operating under an existing federally approved or sanctioned affirmative action program shall be deemed to have satisfied the requirements of P.L. 1975, c.127.

4. Sub-contractors with four (4) or fewer employees are exempt from P.L. 1975, c.127.

5. On construction contracts of 2.5 million dollars or more, the City must set aside ½ of one percent of the total project cost to be used for outreach and training of minorities and females, if necessary, for the contractor to meet the hiring goals.

   (Article 7.5 of the Affirmative Action Regulations)

6. Compliance with the Affirmative Action Regulations of the Government of the United States or the State of New Jersey is not deemed to be compliance with this ordinance since it is the purpose of the City of Camden to adopt standards in excess of those set forth by the State of New Jersey and the Government of the United States.

SECTION 3. All members of the Affirmative Action Review Council and the Affirmative Action Officer of the City of Camden shall be domiciliaries of the City of Camden.

SECTION 4. This ordinance shall take effect twenty (20) days after final passage and publication as provided by law.

Dated: July 24, 1980

The above has been reviewed
and approved as to form.

By /s/ M. J. DICOLA
City Attorney

President
City Council

Mayor

Ordinance MC 1653 Adopted September 11, 1980

JJL:db
8-28-80

AN ORDINANCE AMENDING AN ORDINANCE ENTITLED, "AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN", ADOPTED AUGUST 28, 1980

WHEREAS, the City Council of the City of Camden has adopted an Affirmative Action Progrem in connection with construction contracts to be performed for or on behalf of the City of Camden; and

WHEREAS, the City of Camden, by the City Council, seeks to make certain amendments to make the Program workable and feasiblie for the purposes it was adopted; now, therefore

BE IT ORDAINED by the City Council of Camden, as follows:

SECTION 1. The City Council hereby amends and supplements the following Sections of an Ordinance entitled, "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf Of The City Of Camden", adopted August 28, 1980. Any Section not herein amended or supplemented shall remain in full force and effect as originally drafted:

A. II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial bene-

fit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply, except as provided in Section XII. The Director of the appropriate City Department granting or letting the contract will advise the appropriate state and federal agencies and officials of the standards set forth under this ordinance and request compliance with his ordinance. The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.

B. III. *Establishment of a Camden Affirmative Action Review Council*

In order to facilitate the implementation of this ordinance, there shall be established an Affirmative Action Review Council.

a. The Affirmative Action Review Council shall consist of seven (7) members and the composition of such Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a term of one (1) year; and, thereafter, members of such Council shall serve for a term of two (2) years.

b. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The appointing authority shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractor's associations, government and the minority community. The appointing and consenting authorities shall exercise due diligence and circumspection to ensure the appointment of individuals to the Affirmative Action Review Council who express a commitment to the

letter and spirit of the terms of this ordinance and the purposes and principles this ordinance seeks to advance.

C. IV. *Developer/Contractor's Contracting Obligations*

b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden.

c. The developer/contractor shall make every effort to meet the following goals for minority work utilization in all trades as tradesmen, journeymen and apprentices in performance of his/her contract, whether or not the work is contracted; 1980 twenty-five percent (25%) and 1980 and thereafter twenty-five percent (25%).

The above goals are expressed in terms of man-hours to be worked by minority members in trades and at every union/workman level or equivalent; however, in no event may the total man-hours worked by the minority members during the performance of the contract be less than the annual goals established above.

d. The developer/contractor shall ensure that any sub-contractor working on any part of the project under the sub-contract exceeding $25,000.00 and involving man-hours in excess of eighty (80) hours, per week for four (4) weeks, excluding hours worked by foremen, shall have ten percent (10%) of all journeymen hours worked by minority apprentices in each trade. This shall apply to all specialty trades or craft unions, but not limited to pneumatic tubing, cabinet makers/finishers, heating/electrical temperature controllers and curb and sidewalk installers.

D. VI. *Reporting Requirements*

d. *Contractor Monitoring.* The contractor shall continually monitor all personnel activities to ensure that the Affirmative Action Program is being carried out.

Criteria for Measuring Good Faith are as follows:

1. The contractor will consider for employment journeymen, basic trainees, advanced trainees and apprentices, persons referred to him by any training source approved by the Review Council. If the contractor does not employ any person so referred, he shall submit a written explanation by close of day to the Review Council.

2. Opportunities for minority participation in proposed projects will be submitted to the Affirmative Action Review Council who shall place notifications in area publications, including minority publications and non-profit minority organizations.

3. Information shall be supplied to all minority organizations who seek said information by request directed to the Affirmative Action Review Council.

4. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the contractor, as employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

5. If monitoring reveals significant non-compliance, the Affirmative Action Review Council will examine attempts at compliance measured by the criteria set forth under Section IV and Section VI of this ordinance and attempt to reach an amicable agreement within the parameters of this ordinance. Continued non-compliance, and a lack of an amicable solution thereto, shall result in a referral of the matter to the Department of Administration.

E. VII. *Union Statements*

Paragraph 2 is hereby deleted.

F. XI. *Minority-owned Business Enterprise—Participation On Construction Contracts*

2(d). Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insurance through normal channels, the contractor shall aid and assist the minority business enterprise in procuring the requisite bonding by making any and all lawful and appropriate arrangements with a bonding or insurance company which would satisfy the bonding and/or insurance requirements so that the minority business enterprise could be granted the sub-contract which it seeks.

G. XII. *Establishment Of Goals In Connection With The Award Of Certain Construction Contracts To Minority-Owned Business Enterprises And Purveyors Of Goods And Services*

SECTION 2. All ordinances or parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed as to such inconsistency only.

SECTION 3. This ordinance shall take effect twenty (20) days after final passage and publication as provided by law.

Dated: August 28, 1980

The above has been reviewed
and approved as to form.

/s/ LAURENCE E. ROSOFF
City Attorney

President
City Council

Mayor

APPENDIX D

DEPARTMENT OF LAW
THE CITY HALL
CAMDEN, NEW JERSEY 08101

Laurence E. Rooff
City Attorney
Michael J. DiCola
1st Assistant City Attorney

Stephen W. Lusardi
Timothy P. Inemer
Assistant City Attorneys
In reply please refer to
File No.

November 14, 1980

Mr. Carl G. Briscoe
Chief Affirmative Action Officer
State of New Jersey
Department of the Treasury
State House
Trenton, New Jersey 08625

Re: *City of Camden Affirmative Action Ordinance*

Dear Mr. Briscoe:

Pursuant to your request, enclosed please find the following material:

(1) An Ordinance to Establish an Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden, dated July 24, 1980.

(2) An Ordinance amending the above entitled Ordinance, dated August 28, 1980.

The enclosed ordinances constitute the Affirmative Action Program as adopted by Camden City Council.

It is my understanding that you will review said Ordinances with respect to their compliance with P.L. 1975, c. 127.

If I can be of further assistance, please feel free to contact me.

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
STATE HOUSE
TRENTON, NEW JERSEY 08625

November 24, 1980

Mr. Stephen W. Lusardi
First Assistant City Attorney
Department of Law
City Hall
Camden, N.J. 08101

Dear Mr. Lusardi:

This is to acknowledge that the Affirmative Action Program for construction contractors contained in the City of Camden ordinances dated July 24, 1980 and August 28, 1980 submitted to this office November 14, 1980, meets the minimum requirements of the State Affirmative Action Program. In accordance with Article 6.5 of the Affirmative Action Regulations pursuant to P.L. 1975, c. 127, your program is designated a State Approved Public Agency Affirmative Action Program for the period of November 24, 1980 through November 24, 1981.

Since your program only applies to contracts of more than $50,000, it is expected that the State's regulations and procedures will apply to contracts of $50,000 or less.

Please be reminded that the Affirmative Action Office may review the operation of a State approved program.

Sincerely,

Carl G. Briscoe
Chief Affirmative Action Officer

CGB:rs

cc: Mr. T. Caston, City Affirmative Action Officer
Rev. Eichelberger, Citizen's Coalition
Mr. S. Kudatzki, Attorney, South Jersey Bldg. Trades Assoc.

APPENDIX E

17:27-6.5 State-approved public agency affirmative action construction programs

(a) Notwithstanding any other provisions of this subchapter, a public agency may establish its own affirmative action program for construction contracts and submit said program to the affirmative action office for designation as a State-approved affirmative action construction program. Any public agency program so designated, in accordance with the provisions of this section, shall exclusively establish the State affirmative action procedures and requirements which implement P.L. 1975, c. 127, as amended and supplemented from time to time, as applied to construction contracts and subcontracts involving said public agency.

(b) The affirmative action office may designate a public agency's affirmative action construction program as State-approved only if the program requires the public agency's construction contracts to conform to the mandatory contract language requirements of N.J.A.C. 17:27-3.4 (a), except for the language contained in provision (4) of said subsection; said program requires the public agency's advertisement and solicitation of construction contract bids to contain the following language: "Bidders are required to comply with the requirements of P.L. 1975, c. 127,"; and said program establishes an employment goal which is not lower than the applicable goal established by subchapter 7 of this chapter.

(c) Any construction contractor or subcontractor which submits appropriate evidence that it is operating under an existing federally approved or sanctioned affirmative action program to a public agency, including a public agency which is operating under its own State-approved

affirmative action construction program, shall be deemed to have satisfied the affirmative action requirements of P.L. 1975, c. 127. The determination of the affirmative action office as to what constitutes such appropriate evidence shall be binding.

(d) To obtain the designation for its program as State-approved, a public agency shall submit to the affirmative action office a complete description of its program, copies of the relevant forms and administrative and regulatory documents, and any other information requested by the affirmative action office. Within 60 days of receiving all necessary information, the affirmative action office shall either designate a public agency affirmative action program as State-approved for one year, reject said program, or condition a one year approval designation on the public agency making certain modifications in its program. Any change which a public agency intends to make in such a State-approved program shall first be submitted in writing to the affirmative action office and to be approved by the affirmative action office in writing at its discretion. Any change to a State-approved program made without the written approval of the affirmative action office shall terminate the State approval. Within 60 days prior to the expiration of a State-approval of a public agency's affirmative action construction program, the public agency may seek a one year renewal of the State approval in accordance with the procedure prescribed by this subsection for obtaining an initial State approval.

(e) The affirmative action office may review the operation of any State-approved program; and where appropriate may issue a written notice of termination. Any such termination shall become effective no sooner than 50 days after said written notice is issued and only if the affirmative action office has afforded the administrators of the program an opportunity for an informal hearing.

Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Petitioner,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

On Appeal From the Supreme Court of New Jersey

BRIEF IN OPPOSITION

N. THOMAS FOSTER
City Attorney
Office of City Attorney
13th Floor, City Hall
Camden, New Jersey 08101
(609) 757-7170
Attorney for Respondents

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

Whether a municipal affirmative action ordinance, which requires, in part, that 40% of the workers in public works construction contracts be city residents, is designed to alleviate the social and economic hardships of the citizens of the municipality, and does not bar employment opportunities for residents of neighboring states, violates the Commerce, Privileges and Immunities, or Equal Protection Clauses of the U. S. Constitution.

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No. 81-2110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,
Petitioner,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

Petitioner brought this action to appeal that portion of the final judgment of the Supreme Court of New Jersey, dated February 18, 1982, upholding the validity, under the United States Constitution, of a municipal ordinance passed by the City of Camden, and approved by the State of New Jersey, which requires that at least 40 percent of the employees hired by private contractors engaged in public works construction projects for the City be municipal residents for one year prior to employment. This Brief in Opposition is submitted to demonstrate that the New Jersey Supreme Court correctly interpreted the United States Supreme Court's prior decisions in upholding the validity of this ordinance and that the Petitioner has failed to show a sufficient basis, as indicated in U. S. Sup. Ct. Rule 17, 28 U. S. C. A., for this Court to review the lower court's decision.

OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982 is reported at 88 N. J. 317 (1982), and is reproduced in the Petitioner's Jurisdictional Statement as Appendix A.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Petitioner's Notice of Appeal and Jurisdictional Statement was filed within 90 days of that date. Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1257(2). *See, Erznoznik v. City of Jacksonville*, 422 U. S. 205, 207 n. 3 (1975).

CONSTITUTIONAL PROVISIONS, ORDINANCE AND STATUTE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

> "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Article I, § 8, Cl. 3:

> "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Fourteenth Amendment, § 1:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Ordinance of the City of Camden at issue is set forth in its entirety as Appendix C in the Petitioner's Jurisdictional Statement. In relevant part, it states:

> "WHEREAS, the City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and
>
> WHEREAS, the City Council of the City of Camden in viewing the present economic conditions which confront minority citizens within the City of Camden and said minority citizens make up a significant portion of the population of the City of Camden; and
>
> WHEREAS, the present economic conditions nationwide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and
>
> WHEREAS, the City Council of the City of Camden has been informed that unemployment State-wide is

8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave, than that which existed when the figures were compiled; and

WHEREAS, the City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

WHEREAS, the City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; now, therefore BE IT ORDAINED by the City Council of the City of Camden, as follows:

II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers

a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.

C. IV. *Developer/Contractor's Contracting Obligations*

b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.

I. *Definitions*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile (sic) of the City of Camden expressing an intention to make this City his permanent place of residence."

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5.[1]

1. Petitioner's Jurisdictional Statement, A62-63 (hereinafter App. ——).

STATEMENT OF THE CASE

A. Factual History

Respondents ("the City") seek to oppose Petitioner's request for review of a judgment of the Supreme Court of New Jersey (Petitioner's Jurisdictional Statement, A1-32) upholding a Camden ordinance which requires that 40% of the workers of public works construction contracts for the City be city residents.[2]

The City of Camden is located in Southern New Jersey, across the Delaware River from Philadelphia. The total population of Camden, as reported by the 1980 census, is 84,910.[3] This number represents a marked decline from the 102,551 figure reported in the 1970 census.[4] During that same ten year period, unemployment increased from 6.3%[5] in 1970 to 10.3%[6] in 1980. These figures clearly indicate that the City of Camden has been subjected to the same type of social and economic decline that has plagued many of the major urban areas of the United States. Once considered the political and social capitol of South Jersey, the City has been fighting a constant battle with the major urban problems of high unemployment, increasing crime, and the flight of business to more attractive areas.

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2. Camden Revised Ordinances, MC #1653, § C.IV, ¶ b.

3. Source: 1980 Census of Housing and Population, U. S. Department of Commerce, Bureau of the Census. Issue Date: March, 1981.

4. Source: 1970 U. S. Census, PAC (1)-159, table P-2, pp. 85-92. U. S. Department of Commerce, Bureau of the Census.

5. Source: 1970—Office of Demographic and Economic Analysis, Bureau of Labor Force Statistics, Division of Planning and Research, N. J. Department of Labor.

6. Source: 1980—"New Jersey Employment and the Economy," Division of Planning and Research, N. J. Department of Labor.

In an effort to promote community pride in its public works construction projects, increase employment opportunities for its citizens, and improve the economic position of its citizens, the City enacted City Ordinance MC-1650, entitled "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf Of The City of Camden."[7] This ordinance was further amended by MC-1653, which contains the challenged 40% residency requirement.[8] The ordinance also provides for a minority hiring goal of 25%. That provision is not in dispute in this appeal.

The express purpose of the ordinance is to "preserve the economic well-being of all citizens of the City of Camden,"[9] . . . "relieve the problem of unemployment among its residents and citizens and . . . promote the growth of minority involvement in construction."[10]

In enacting this ordinance, Camden City Council carefully considered the official unemployment statistics compiled by the Department of Labor of the United States and the New Jersey Department of Labor Affirmative Action Office.[11] Those statistics revealed that unemployment in the City exceeds both the national and state unemployment rates. Moreover, since the national unemployment rates for blacks and Hispanics were both greater than double the overall national unemployment rate,[12] and

7. App. 36-53.

8. App. 54-58.

9. App. 36, ¶ 1.

10. *Id.* at ¶ 5.

11. App. 36-37.

12. The national unemployment rate for 1980 was 7.1%. Source: "Employment and Earnings," L-2.41/2.28/1, U. S. Department of Labor, Bureau of Labor Statistics, Date: January, 1981. The unemployment rates for Black-Americans and Hispanic-Americans is contained in the preamble to Ordinance MC-1650, and reported at App. 36-37.

since these two groups comprise more than 70% of the City's total population,[13] it follows that the City's unemployment picture is even more dismal than the official statistics suggest.

B. Procedural History

The ordinance was enacted pursuant to the 1975 amendments to the New Jersey Law Against Discrimination. L. 1975, C. 127, *N. J. S. A.* 10:5-31 to 38. The relevant section of that statute, N. J. S. A. 10:5-36(c), authorizes state and local agencies to design their own affirmative action programs to meet local needs and submit them to the State Treasurer for approval. Upon approval, that program will then effectively serve the same function as the State Affirmative Action Program.

The City designed such a program which was accordingly approved by the Chief Affirmative Action Officer of the New Jersey Treasury Department on November 24, 1980.[14] Petitioner challenged both the constitutionality of the ordinance and the administrative procedure by which it was approved. Petitioner filed an appeal with the New Jersey Superior Court, Appellate Division. On June 19, 1981, the New Jersey Supreme Court accepted the appeal by direct certification, pursuant to New Jersey Court Rule 2:12-1. On February 19, 1982, the Court unanimously upheld the constitutionality of the City ordinance as well as the validity of the administrative approval procedure.[15]

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13. The New Jersey Supreme Court noted that "the black population represents 53.0% of Camden City . . ." and "19.2% of Camden City residents identify themselves as being of Hispanic origin." App. 10.

14. App. 60.

15. App. 21.

MEANING OF THE DECISION BELOW

The court held that the ordinance did not violate either the Privileges and Immunities, Commerce, or Equal Protection Clauses of the U. S. Constitution.[16]

The court ruled that the ordinance did not violate the Privileges and Immunities Clause since it affected more state residents than non-residents.[17] In determining whether the Privileges and Immunities Clause could bar the City ordinance, the New Jersey high court looked to the specific purpose of the clause as expressed in the Constitution, and interpreted by this Court, most recently in *Hicklin v. Orbeck*, 437 U. S. 518 (1978). Since the ordinance did not "aim primarily at out-of-state residents" [18] but only placed them on the "same footing" [19] with other New Jersey residents, the Court determined that it did "not violate any privilege of state citizenship." [20]

This holding is *not* a *redefining* of the Privileges and Immunities Clause, as Petitioner contends, but is merely an application in accord with this Court's interpretation of Article IV, Section 2 of the Constitution. Even though some non-residents may be affected, the crucial factor is that any potential burden is assumed by more New Jersey residents than non-New Jersey Residents.

The ordinance was also upheld by the court in the face of a Commerce Clause challenge. While again using the language and analysis of this Court, the lower court felt that since the City was merely assuming the role of a *market participant* rather than a *market regulator*, it

16. App. 22-28.

17. App. 26.

18. *Id.*

19. *Hicklin*, 437 U. S. at 524.

20. App. 26.

should be immune from Commerce Clause analysis.[21] The court followed its own case law, which was fashioned after this Court's ruling in *Alexandria Scrap, supra,* and *Reeves, Inc. v. Stake,* 447 U. S. 429 (1980), in deciding that the City should be entitled to "favor its own citizens and choose the parties with whom it will deal."[22]

The court determined that since the City is not regulating the flow of commerce between private parties in the national marketplace,[23] it is not, in fact, a market regulator.[24]

Petitioner nevertheless contends that the City is regulating the hiring practices of private employers and should be subject to Commerce Clause analysis as a market regulator. This contention is without merit. Although Petitioner may choose to avoid the hiring requirements of the ordinance by refusing to pursue public works contracts with the City, this should not automatically subject the ordinance to Commerce Clause scrutiny. In addition, Petitioner has failed to support its claim that the ordinance places an impermissible burden on either Petitioner individually or the national marketplace.

The Court should also keep in mind that denial of certiorari in the present case will not reflect on the Court's decision to review *Mass. Council of Construction Employers, Inc. v. Mayor of Boston,* — U. S. —, 425 N. E. 2d 346 (1981), *cert. granted sub nom. White v. Mass. Council of Construction Employees,* 102 S. Ct. 1273 (No. 81-1003, 1982). The social and economic conditions of the City

21. *See Hughes v. Alexandria Scrap, Inc.,* 426 U. S. 794 (1976).

22. App. 23-24. *See K. S. B. Tech. Sales v. North Jersey Dist. Water Supply,* 75 N. J. 272, 298, 381 A. 2d 774, 787 (1977).

23. *See H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 539 (1949).

24. App. 22.

of Camden are sufficiently different from the Boston situation to allow this Court to treat the cases separately and affirm the decision of the New Jersey Supreme Court.

The New Jersey Court also held that since there is no infringement on the fundamental right to travel, as recognized in *Shapiro v. Thompson*, 394 U. S. 618 (1969), the ordinance did not violate the Equal Protection Clause.[25] The Court likened the ordinance to residency requirements for municipal employees, *see McCarthy v. Philadelphia Civil Service Commission*, 424 U. S. 645 (1976), and found a rational relationship between the residency requirement and the advancement of the City's public welfare.[26]

The court also followed Supreme Court precedent in rejecting the notion of a fundamental right to work. *See Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1976). Since there is no fundamental right involved, and since a rational relationship exists between the residency requirement and the advancement of the City's public welfare, the court concluded that the ordinance does not violate the Equal Protection Clause.[27]

25. App. 27.

26. *Id.*

27. App. 28.

ARGUMENT

I. The New Jersey Supreme Court Correctly Held That the Camden Ordinance Is Immune From Privileges and Immunities Analysis Since the Ordinance Affects More In-State Residents Than Out-of-State Residents

In upholding the City's residency requirement for workers in public works construction contracts, the New Jersey Supreme Court correctly ruled that the Privileges and Immunities Clause "is not invoked to strike down local ordinances that favor city residents."[28] That court's decision reflects the traditional application of the Privileges and Immunities Clause by the Supreme Court. This Court recognized early that the purpose of the Privileges and Immunities Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned." *Hicklin v. Orbeck, supra,* 437 U. S. at 524 quoting *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 180 (1869). For this reason, Petitioner's request for certiorari on these grounds must be dismissed.

The present case does not offer the type of discrimination which the Privileges and Immunities Clause was intended to proscribe. Indeed, the New Jersey Supreme Court noted that the ordinance not only places New Jersey residents on the "same footing" as non-New Jersey residents, but ". . . most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents."[29] Petitioner has failed to establish facts to dispute this finding.

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28. App. 26.

29. *Id.*

Similarly, the Supreme Court for the Commonwealth of Massachusetts held that an executive order requiring no less than 50% of the workers on public works contracts be Boston residents was not violative of the Privileges and Immunities Clause. *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra.* The underlying rationale of this ruling was that "the discrimination adversely affects citizens of the Commonwealth as well." *Id.* at 354.

In light of this concurrence in constitutional interpretation by the Supreme Judicial Courts of New Jersey and Massachusetts, Petitioner has failed to meet its burden of establishing a conflict between higher courts. *See* U. S. Supreme Court Rule 17, 28 U. S. C. A. Moreover, the cases cited by Petitioner may be distinguished on several grounds. Those cases involve either an absolute bar imposed by localities upon non-residents,[30] a state law that offers an absolute preference to state residents, or a state law which places an impermissible burden upon non-residents.[31] The City of Camden Affirmative Action Ordi-

30. *Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance directing non-resident bakeries delivering within the city to pay a higher license tax than resident bakeries); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (higher licensing fees imposed only on non-residents); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance excluding bona fide residents from provisions of regulations on peddlers); *Commonwealth v. Snyder*, 182 Pa. St. 630, 38 Atl. 356 (1897) (peddlers license fee not imposed on county residents); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county); *cf., Construction and General Laborers Union Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance requiring all municipal contractors to employ only county residents).

31. The following cases all represent instances of state laws which have been struck down for impermissibly discriminating

nance fits into none of these categories. Although the Camden ordinance has the effect of giving a limited preference to Camden residents, it does not absolutely bar the participation of either non-Camden or non-New Jersey residents. The ordinance actually provides that up to 60% of the employment opportunities generated by public works construction contracts, may be filled by non-Camden residents, both in-state and out-of-state.

Petitioner relies mainly upon the Supreme Court's recent ruling in *Hicklin v. Orbeck, supra,* in which Alaska's across-the-board hiring statute was found violative of the Privileges and Immunities Clause. The absolute bar on out-of-state residents found in *Hicklin* does not exist in the Camden ordinance. Hence, this Court's analysis in that instance is inapplicable in the present case. Petitioner has further failed to provide additional authority

31. (Cont'd.)

against an out-of-state resident's involvement in the commercial fishing industry, *see e.g. Toomer v. Witsell,* 334 U. S. 385 (1948); *Mullaney v. Anderson,* 342 U. S. 415 (1952); *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962); *Gospodnovich v. Clements,* 108 F. Supp. 234 (E. D. La. 1951), *app. dismissed,* 344 U. S. 911 (1953); *Edwards v. Leaver,* 102 F. Supp. 698 (D. R. I. 1952); marketing of produce, *Ward v. Maryland,* 79 U. S. (12 Wall.) 418 (1871); employment on oil and gas pipelines, *Hicklin v. Orbeck, supra;* ferry boat engineer officer, *District No. 1 Pacific Coast District, M. E. B. A. v. Ward,* 505 F. Supp. 98 (W. D. Wash. 1981) and public works construction, *Salla v. County of Monroe,* 48 N. Y. 2d 514, 399 N. E. 2d 909, 423 N. Y. S. 2d 878 (1979), *cert. denied sub nom. Abrams v. Salla,* 446 U. S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause,* 181 N. J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981); admission to the bar, *Stallard v. South Dakota Board of Bar Examiners,* 530 F. Supp. 155 (D. S. D. 1982); *Strauss v. Alabama State Bar,* 520 F. Supp. 173 (N. D. Ala. 1981); *Sheley v. Alaska Bar Association,* 620 P. 2d 640 (Alaska 1980); *Gordon v. Committee on Character and Fitness,* 48 N. Y. 2d 266, 397 N. E. 2d 1309, 422 N. Y. S. 2d 641 (1979).

which would support its demand for Supreme Court review on this issue.

There is no factual basis, either in the record or established by Petitioner in its brief, to rebut the clear and obvious intent of the Camden ordinance not to discriminate against out-of-state residents. Respondents urge that the holding of the New Jersey Supreme Court must stand. Petitioner has failed to establish any high court decisions which conflict with the New Jersey and Massachusetts Courts on these facts. Therefore, Respondents request that the Petition for Certiorari be denied. The question raised by Petitioner is one that has been conclusively resolved by recent decisions. It does not merit review by our highest Court.

II. The Camden Ordinance Does Not Violate the Commerce Clause.

A. The New Jersey Supreme Court Correctly Viewed the City as a Market Participant and the Ordinance Is Therefore Immune From Commerce Clause Scrutiny.

The New Jersey Supreme Court held that since "the City of Camden is not regulating the flow of commerce between private parties . . . [it] is acting in the role of market participant, not market regulator." [32] In establishing the "market participant" concept, this Court stated that "the Commerce Clause responds principally to state taxes and regulating measures impeding free private trade in the national market place." *Hughes v. Alexandria Scrap*, 426 U. S. at 807-808. The Camden ordinance represents no such tax or regulatory measure, nor has Petitioner shown an impermissible burden on interstate trade.

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32. App. 22.

The state program in *Alexandria Scrap*, *supra*, was designed to remove abandoned automobiles from the state's roadways and junkyards, and "imposed more exacting documentation requirements on out-of-state than in-state processors." *Reeves, Inc. v. Stake*, 447 U. S. at 434. In *Reeves*, the state-owned cement plant "reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis." *Id.* at 432. Camden's ordinance is certainly much less rigid than the two programs described above. Yet this Court ruled that both Maryland and South Dakota were merely acting as market participants and, as such, were entitled to make demands that would otherwise have been impermissible for a governmental entity acting in a regulatory capacity.

The City, like the states of Maryland and South Dakota, has assumed a proprietary capacity[33] but, unlike those states, continues to offer commercial opportunities to out-of-state construction firms. As this Court stated in *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940), "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127. The Court continued this policy in *Alexandria Scrap*, *supra*, and concluded "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional

33. *See also American Yearbook v. Askew*, 339 F. Supp. 719 (N. D. Fla. 1972) (three-judge District Court upholding a Florida statute requiring the State to obtain needed printing services from in-state shops. "[S]tate proprietary functions" are exempt from Commerce Clause scrutiny. *Id.* at 725. This Court affirmed summarily, 409 U. S. 904 (1972).

action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810.

Petitioner maintains that the Camden ordinance regulates the hiring practices of private contractors. This is a misapplication of the market participant/regulator concept as well as a misinterpretation of the ordinance. The City has not established inflexible hiring regulations for private construction firms, as Petitioner contends, but merely requires that contractors show a preference towards Camden residents when the project is substantial and is located in the City of Camden. By establishing a minimum cost requirement of $50,000, the City has focused only on those projects which would involve additional work crews, and which should not affect *steady hands*. Keeping in mind that the *regular* employment of construction firms often varies with the number and size of their projects, the City simply requires that these firms employ some Camden residents when additional workers are needed. The ordinance is a reasonable compromise: it does not preclude the employment of out-of-state residents and it does, indeed, serve a valid public purpose.

In addition, the fact that the Respondents in *Alexandria Scrap*, *supra*, and the Petitioner in *Reeves*, *supra*, suffered substantial hardship [34] had little or no effect in the Court's determination that the respective states were market participants. In both cases the Court followed the principal that the Commerce Clause "protects the interstate market, not particular interstate firms. . . ." *Exxon*

34. The Respondent in *Alexandria Scrap* submitted an affidavit which showed that in the six months following the effective date of the amendment, the Respondent had received 31.8% fewer bounty-eligible hulks than during the six months preceding the effective date of the amendment. 426 U. S. at 801 n. 11. The Petitioner in *Reeves*, after being turned away by the South Dakota cement plant, was forced to cut production by 76%. 447 U. S. at 432.

Corp. v. Governor of Maryland, 437 U. S. 117, 127 (1978). The Petitioner in the present case has provided no evidence of hardship with respect to the interstate market or to Petitioner itself. In short, this is not "the kind of action with which the Commerce Clause is concerned." *Hughes v. Alexandria Scrap*, 426 U. S. at 805.

B. The Court's Denial of Certiorari in the Present Case Will Not Conflict With the Court's Grant of Certiorari in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston* Since the Facts Surrounding the Boston Executive Order and the Camden Ordinance Are Substantially Different for Purposes of Commerce Clause Analysis.

The Supreme Court has granted certiorari to *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra, cert. granted sub nom. White v. Mass. Council of Construction Employees*, — U. S. —, 102 S. Ct. 1273 (No. 81-1033, 1982). The Massachusetts Supreme Court compared the Boston Executive Order and the factual record before it with the Court's analysis of the Commerce Clause in prior judicial decisions.[35] As reflected in the authorities cited in § II (A), *supra*, Commerce Clause analysis requires a pairing of the facts of each case with the aim of the Commerce Clause.

The court in *Mass. Council, supra*, relied on a statement of agreed facts in determining that a significant impact would be felt by the interstate construction firms.[36] The present case offers no such agreement or record of injury to any of the interested parties. Commerce Clause review by this Court would therefore be limited to review

35. *See Philadelphia v. New Jersey*, 437 U. S. 617 (1978), *Hicklin v. Orbeck, supra, Reeves, Inc. v. Stake, supra.*

36. 425 N. E. 2d 354.

of the Camden ordinance on its face. (See Procedural History under STATEMENT OF THE CASE.) Consequently, the decision to deny or grant certiorari in the present case must be based upon a full analysis of the factors set forth in § I (A), *supra*. Thus, the granting of certiorari in *Mass. Council*, *supra*, should not be viewed by Petitioner as a *carte blanche* reason for this Court to grant certiorari in the present case.

A further distinction between the two cases is that the $50,000 minimum cost requirement allows for the hiring of additional employees on major construction sites. The Boston order, however, requires a minimum hiring requirement of Boston residents on all construction projects within the city.[37]

Moreover, the Massachusetts court held that the order was overly broad for its express purposes. The Court stated:

> "the extensive preference for local residents contained in the executive order cannot come within the exception outlined by *Reeves* because it sweeps so broadly. In *Reeves*, the existence of a genuine shortage of concrete necessitated some form of rationing. The State's choice of favoring its own citizens was a rational means of allocation which recognized the special interests of local taxpayers."[38]

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37. The relevant portion of the mayor's order is as follows: "(1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expands or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows: "a. at least 50% by bona fide Boston residents". 425 N. E. 2d at 347-348 n. 4.

38. *Id.* at 355.

Similarly, the Camden ordinance should be viewed as a rational means to combat its profound unemployment problem. The City is not passing judgment on either the propriety of the Boston executive order or the decision of the Massachusetts Supreme Court, but given the high rate of unemployment in Camden, with no sign of future relief, the City's ordinance is the most reasonable approach to deal with this unique situation. The City submits that the particularities of the extreme circumstances in Camden should clearly distinguish the present case from the Massachusetts case.

This distinction is illustrated by the following statistics. Unemployment in Boston in 1980 was recorded at 6.2%.[39] The unemployment rate in Camden in that same year was 10.3%.[40] The population in Boston in 1980 was recorded at approximately 563,000 residents, with blacks and Hispanics comprising approximately 163,000 or 29% of the total population.[41] The black and Hispanic population in Camden, as noted above, is more than 70% of the total population. With the national unemployment rates for blacks and Hispanics more than double the national rate, it is clear that an Affirmative Action Program is necessary in Camden. Therefore, this Program should fall within the exception outlined by *Reeves*, *supra*, and the ruling of the New Jersey Supreme Court should be upheld.

For the foregoing reasons, the City respectfully submits that (1) Petitioner has not sustained its burden of showing sufficient reason for this Court to review the

39. Source: Massachusetts Division of Employment Security, Labor Area Research Department.

40. *See* STATEMENT OF THE CASE.

41. Source: 1980 Census of Housing and Population, U. S. Department of Commerce, Bureau of the Census.

New Jersey Supreme Court's ruling, and (2) the unemployment situation in Camden is substantially different from that in Boston to allow this Court to dismiss the present case without reflecting on its prior grant of certiorari in the Massachusetts case.

It is also respectfully submitted that the present case would be distinguishable from any affirmance of *Mass. Council, supra.* Alternatively, if *Mass. Council, supra,* is reversed, then the New Jersey Supreme Court decision would still be in accord with that ruling.

III. The New Jersey Supreme Court Correctly Held That the Camden Residency Requirement Does Not Violate the Equal Protection Clause Since It Does Not Impermissibly Burden the Right to Interstate Travel.

The New Jersey Supreme Court rejected Petitioner's claim that the Camden ordinance impermissibly burdens the fundamental right to interstate travel. *See, e.g. Shapiro v. Thompson, supra.* The court likened the durational residency requirement to the type of bona fide residency requirement that this Court upheld in *McCarthy v. Philadelphia Civil Service Commission, supra.* And since the "right to employment on a local public works project . . ."[42] is not a fundamental right, the New Jersey court concluded that the rational relationship between the residency requirement and the need for economic revitalization is sufficient for upholding the ordinance. *Allied Stores of Ohio v. Bowers,* 358 U. S. 522, 528 (1959).

Petitioner contends that the court's ruling ignored this Court's recognition of the fundamental right to interstate travel in *Shapiro v. Thompson, supra.* For purposes of Equal Protection analysis, however, the cases relied on by Petitioner are significantly different from the present

42. App. 28.

case. *See Shapiro, supra; Dunn v. Blumstein*, 405 U. S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). The Camden ordinance, while requiring 40% employment of those individuals who have resided in Camden for 12 months or longer, does not involve the absolute durational residency requirement of the aforementioned cases. As discussed above, the ordinance still provides as much as 60% employment opportunities to non-Camden residents. Thus, it does not follow that this ordinance requires a person to choose between travel and access to employment opportunities. *Dunn*, 405 U. S. at 342. In short, the ordinance does not "penalize citizens for exercising their constitutional right to travel." *Jones v. Helms*, 452 U. S. 412, 420-421 (1981).

It should be emphasized that the New Jersey Supreme Court did not ignore the difference between durational and bona fide residency requirements, but merely recognized that this case was not subject to a durational residency type of analysis. Since no fundamental right was jeopardized, the New Jersey court correctly ruled that the Camden ordinance does not offend the Equal Protection Clause of the Fourteenth Amendment.

Petitioner also acknowledges that this Court has upheld durational residency requirements, *see, e.g., Sosna v. Iowa*, 419 U. S. 393 (1975) when the government service requested is not a "basic necessity of life." *Memorial Hospital v. Maricopa County*, 415 U. S. at 259. Petitioner then asserts, without any factual or case support, that public employment is a *basic necessity of life* and is thus more akin to non-emergency medical care or welfare assistance than to divorce. For constitutional analysis, however, Petitioner should be expected to offer something more substantial than mere assertions equating public employment with welfare assistance. As this Court

wrote in *Sosna*, the common element of *Shapiro*, *Dunn*, and *Maricopa County*, "was that the durational residency requirements they struck down were justified on the basis of budgetary or record keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals." *Sosna v. Iowa*, 419 U. S. at 406.

Moreover, the City's residency requirement, like "Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience." *Id.* at 407; *cf. Kahn v. Shevin*, 416 U. S. 351 (1974). The severity of the unemployment problem in Camden, as recognized by the New Jersey Supreme Court in *City of Camden v. Skokowski*, 88 N. J. 304, 441 A. 2d 741 (1982), required that some action be taken to alleviate Camden's dire situation. The Camden City Council, in responding to this need, enacted the challenged ordinance for the social and economic advancement of its citizens while still providing employment opportunities for non-residents. And, unlike in *Sosna, supra*, where non-residents faced a delay in the administration of government services, non-residents in the present case are not subject to any waiting period.

In addition, the Camden ordinance does not "irretrievably [deprive] all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood."[43] Petitioner again fails to support this assertion. These *non-residents* do, in fact, enjoy access to employment opportunities generated by the public works construction contracts.

Moreover, the fact that unemployment is a national problem does not preclude municipalities from invoking their police power to deal with serious individual problems. The City recognizes that a State is not able "to

43. Petitioner's Jurisdictional Statement at 44.

isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders." *Edwards v. California*, 314 U. S. 160, 173-174 (1941). But the City ordinance results in no such restriction. It is a reasonable compromise which offers employment opportunities to non-residents while attending to its local needs.

In the absence of any tangible evidence supporting the contentions that the Camden City Council has overreached its powers in enacting this ordinance, and that the New Jersey Supreme Court's decision is contrary to this Court's decisions, the City respectfully submits that this ruling should be upheld and should not be granted review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny certiorari in the present case. Petitioner has failed to establish a sufficient basis for review. However, Respondent respectfully reserves the right to submit a brief presenting a full discussion of the issues if this Court does grant certiorari.

Respectfully submitted,

N. THOMAS FOSTER
City Attorney
Office of City Attorney
13th Floor, City Hall
Camden, New Jersey 08101
(609) 757-7170
Attorney for Respondents

NO. 81-2110

Office - Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey.
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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NO. 81-2110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

The Appellee Department of Treasury of the State of New Jersey hereby moves to dismiss the appeal pursuant to Rule 16.1(b) on the grounds that the federal questions raised in this appeal are not substantial.

Statement of the Case

This is an appeal from a final judgment of the Supreme Court of New Jersey sustaining against constitutional challenge an affirmative action program enacted by the City of Camden in the State of New Jersey. The Camden affirmative action program applies to all construction contracts awarded by the City when the cost of the contract exceeds $50,000. The program, which was approved by the Department of Treasury of the State of New Jersey, includes a provision whereby the contractor is to make every effort to employ persons residing in the City of Camden "but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden." (App. C at 56a). The Camden program also provides that a resident of the City of Camden is any person who has been domiciled in the City for a continuous period of twelve (12) consecutive months prior to the application for employment (App. C at 38a). The Appellant United Building and Construction Trades Council of Camden County and Vicinity argued below that the resident hiring requirements contravened the Constitution of the United States, invoking the Privileges and Immunities Clause, U.S. Const., Art. IV, §2, cl. 1, the Commerce Clause, U.S. Const., Art. I, §8, and the Equal Protection Clause, U.S. Const., Amend XIV. The Supreme Court of New Jersey disagreed and this appeal followed.

In 1975, the Legislature of the State of New Jersey enacted amendments to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-31 to 38, requiring that no public works contract be awarded by the State or any of its political subdivisions unless the contractor has agreed and guaranteed "to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N.J.S.A. 10:5-32. The State Treasurer subsequently promulgated rules

and regulations which established minimum guidelines for adequacy of affirmative action plans pertaining to construction contracts, N.J.A.C. 17:27-6.5(b), as well as minority hiring goals for each of the State's 21 counties. N.J.A.C. 17:27-7.3. The regulations permit any public agency to promulgate an affirmative action program for construction contracts as long as it meets the minimum State requirements and establishes a minority hiring goal which is not less than that established for the particular county in question. N.J.A.C. 17:27-6.5(b). Once approved by the State Treasurer, the public agency affirmative action plan applies to all construction contracts and subcontracts involving that public agency when the cost exceeds $50,000. N.J.A.C. 17:27-6.5(a).

The City of Camden in the County of Camden is one of the older urban areas in the State of New Jersey. As indicated by the results from the 1980 census, about 70% of the residents of the City are members of minority groups (App. A at 10a). The unemployment rate for the City generally averages twice or three times the national rate. Camden has one of the highest uncollectible tax rates in New Jersey. Furthermore, the residential tax base is small and consists of very modest homes. The industrial and commercial values have shrunk over the last three decades. See *Camden* v. *Skokowski*, 88 N.J. 304, 305, 441 A.2d 741, 742 (1982).

On July 24, 1980, the City Council of Camden adopted an ordinance to establish an affirmative action program for construction contracts to be performed for on or behalf of the City. The ordinance noted that its adoption was prompted by the economic conditions confronting the minority citizens of the City, and stated further that

> . . . the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for

> the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmtive Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-American was 15.6%. The latter figures were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly . . . [App. C at 36a-37a]

The ordinance indicated that its purpose was to relieve the problem of unemployment confronting the citizens of Camden and to promote minority involvement in construction (App. C at 37a).

The Camden ordinance established a program which satisfied the minimum State requirements and which provided that construction contractors "shall make every effort to employ not less than 25% minority workers." (App. C at 40a). This hiring goal was greater than the 20% minority hiring goal established by the State Treasurer for the County of Camden. *See* N.J.A.C. 17:27-7.3. The July 24, 1980 ordinance was amended by a second ordinance adopted on August 28, 1980. This second ordinance included a provision whereby the contractors were to "make every effort to employ persons residing within the City of Camden but in no event shall less than 40% of the entire labor force be residents of the City of Camden." (App. C at 56a). The term "resident" was defined in the July 1980 ordinance as a person who has been domiciled in the City for a "continuous period of twelve (12) consecutive months prior to the application for employment" and continues as a City resident "during the term of employment or contract." (App. C at 38a). On November 24, 1980, the

Chief Affirmative Action Officer for the State Department of Treasury approved the Camden program because it met the minimum requirements prescribed by N.J.A.C. 17:27-6.5(b) (App. D at 60a).

The Appellant appealed the Department of Treasury's approval of the Camden program to the Appellate Division of the Superior Court of New Jersey. Prior to argument or decision in the Appellate Division, the Supreme Court of New Jersey took jurisdiction of the appeal by direct certification pursuant to N.J. Court R. 2:12-1. The Appellant challenged the Camden minority hiring goal on various State statutory and constitutional grounds and maintained that the minority hiring goal was a denial of equal protection under the Fourteenth Amendment to the Constitution of the United States. The Appellant also challenged the resident hiring requirements on the basis that they violated the Privileges and Immunities Clause, U.S. Const., Art. IV, §2, cl. 1, the Commerce Clause, U.S. Const., Art. I, §8, and the Equal Protection Clause, U.S. Const., Amend. XIV.

By decision entered on February 18, 1982, the Supreme Court of New Jersey rejected all of the contentions raised by the Appellant. The Court ruled that the minority hiring goals were consistent with State statutory and constitutional law and did not violate the Equal Protection Clause.* The New Jersey Court also held that the residency hiring requirements did not contravene the Constitution of the United States (App. A at 22a-28a). Since the Camden residency preference was not aimed primarily at out-of-state residents, and since it affected New Jersey residents who did not live in Camden just as it affected

* The Appellant does not appeal from this portion of the judgment of the Supreme Court of New Jersey. See Jurisdictional Statement at 10, n.19.

residents of States other than New Jersey, the Court concluded that the hiring preference did not violate the Privileges and Immunities Clause. With respect to the Commerce Clause, the Supreme Court of New Jersey held that in adopting the hiring preference, the City of Camden was not acting in the role of a market regulator but was merely establishing the conditions of its participation in the market. Accordingly, the Court found no violation of the Commerce Clause. Finally, the Supreme Court of New Jersey sustained the resident hiring requirements against the assertion that they contravened the Equal Protection Clause, concluding that there was a rational basis for the City to adopt the limited preference for its own citizens. A Notice of Appeal dated April 22, 1982 was filed with the Court below seeking review by this Court under 28 U.S.C. §1257(c) of that portion of the judgment of the New Jersey Court sustaining the constitutionality of the resident hiring provisions of the Camden plan.

ARGUMENT

POINT I

The appeal should be dismissed because the limited hiring preference for Camden residents established by the Camden ordinance does not violate the Privileges and Immunities Clause since it establishes no preference on the basis of State residency or citizenship.

In its decision below, the Supreme Court of New Jersey concluded that the resident hiring preference of the Camden ordinance, which is limited in its application to 40% of the available jobs on construction contracts performed for or on behalf of the City of Camden, does not violate the Privileges and Immunities Clause. U.S. Const., Art. IV, §2, cl. 1 (App. A at 25a-26a). The New Jersey Court held that the Clause does not foreclose the enactment of local ordinances that favor city residents because such regulations are not aimed primarily at those who reside in states other than New Jersey. A resident hiring preference, such as that adopted by the City of Camden, affects New Jersey residents who do not reside in Camden just as it affects residents of other states. The Camden ordinance does not deny to out-of-state citizens any privilege of citizenship shared by the residents of New Jersey (App. A at 26a). Notwithstanding the Appellant's arguments to the contrary, the decision of the Supreme Court of New Jersey is entirely in accord with the fundamental purpose of the Privileges and Immunities Clause and with the decisions of this Court.

The Privileges and Immunities Clause states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. Const., Art. IV, §2, cl. 1. The Clause "establishes a norm

of comity," *Austin* v. *New Hampshire*, 420 U.S. 656, 660 (1975), that is to prevail "among the states with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The purpose of the Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall 168, 180 (1869). The design of the Privileges and Immunities Clause was to insure that when a citizen of one state ventures into another he will enjoy the same privileges enjoyed by the citizens residing there. *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948).

The decisions of this Court make plain that the distinctions at which the Clause was aimed are those grounded upon *state* citizenship. In *Hicklin* v. *Orbeck*, *supra*, the Court held that an Alaska statute which required the employment of qualified Alaska residents in the performance of certain oil and gas related contracts in preference to residents of other states was violative of the Privileges and Immunities Clause. Similarly, in *Austin* v. *New Hampshire*, *supra*, the New Hampshire Commuter Income Tax was declared to be in violation of the Clause because it fell exclusively upon the income of nonresidents of the State of New Hampshire. *See also Toomer* v. *Witsell*, *supra*, (South Carolina statute which required nonresidents of South Carolina to pay a fee 100 times greater than that paid by residents for a commercial shrimp license violated the Privileges and Immunities Clause); *Ward* v. *Maryland*, 12 Wall. 418 (1871) (Maryland law which required those not permanent residents of Maryland to obtain a license to sell goods other than those produced or manufactured in Maryland violated the Privileges and Immunities Clause). These cases make clear that the Clause has its application only with respect to discriminatory restrictions in favor of *state* residents generally. *Hicklin* v. *Orbeck*, *supra*, 437 U.S. at 525.

The hiring preferences established in the Camden ordinance at issue in this case are not drawn on the basis of *state* citizenship but are instead based only upon municipal residency. While it is true that Camden, as a municipality, is a creature of the State of New Jersey subject to its legislative control, this does not alter the plain fact that the Camden hiring preference is one limited to Camden residents. The hiring preference is not one shared by all who are New Jersey residents. As indicated above, Camden residents may seek 100% of the available positions on construction projects undertaken for or on behalf of the City of Camden. The fact that residents of Delaware or Pennsylvania may seek only 60% of these positions is of no constitutional significance for purposes of the Privileges and Immunities Clause because this same limitation applies to New Jersey residents who do not reside in Camden. The ability to secure 100%, as opposed to 60% of the available positions, even if considered a "privilege" within the meaning of the Clause, is not a "privilege" of citizenship of New Jersey. It is not a "privilege" which is common to the citizens of New Jersey "under their Constitution and Law by virtue of their being citizens." *Paul* v. *Virginia, supra,* 8 Wall. at 180. Accordingly the Supreme Court of New Jersey was correct in its conclusion that the distinction drawn between residents and nonresidents in the Camden ordinance was not a distinction at which the Privileges and Immunities Clause was directed.*

---

* The Chancery Division of the Superior Court of New Jersey declared a New Jersey statute establishing an employment preference for State citizens in public works contracts, N.J.S.A. 34:9-2, as violative of the Privileges and Immunities Clause. See *Neshaminy Constructors, Inc.* v. *Krause,* 181 N.J. Super. 367, 437 A.2d 733 (Ch. Div. 1981). That case is on appeal to the Appellate Division of the Superior Court of New Jersey. The statute in question states that preference in employment on public works construction projects "shall be given to citizens of the State of New Jersey." N.J.S.A. 34:9-2.

It is abundantly clear, therefore, that the Appellant's challenge to the residency preference of the Camden enactment is entirely without substance. Its heavy reliance upon the Court's decision in *Hicklin* v. *Orbeck, supra,* is clearly misplaced. There is no discrimination in favor of *state* residents as there was in the Alaska statute struck down in *Hicklin* v. *Orbeck, supra.* What is more, even if the Privileges and Immunities Clause is held to apply to the residency preference established by the City of Camden, the Camden residency preference is clearly distinguishable from that at issue in *Hicklin* v. *Orbeck, supra.* There Alaska had legislated a resident hiring preference with respect to certain oil or gas leases that extended, as the Court stated

> . . . to employees who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil or gas or ever set foot on State land . . . [*Id.*, 437 U.S. at 530]

The hiring preference at issue in this case has a direct relationship to contracts awarded by the City. It applies *solely* with respect to 40% of the employment opportunities provided by these particular contracts. The Court, in *Hicklin,* expressly recognized that the State's ownership of property or resources may provide ample justification for a State's preferring its citizens over those residing in other states. See *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 385 (1978). Given the City of Camden's proprietary interest in its own contracts, and the

limited nature of the hiring preference, it is clear that even if the Clause is held to apply to municipal, as opposed to state, residency classifications, this case presents no violation of the Privileges and Immunities Clause.

POINT II

The appeal should be dismissed because in adopting the limited hiring preference for City residents on City construction projects, the City was acting as a participant in the marketplace and its hiring preference does not therefore violate the Commerce Clause of the Constitution of the United States.

The Commerce Clause of the Constitution of the United States, which empowers the Congress to regulate commerce "among the several States," U.S. Const., Art. I, §8, is an expressed grant of power authorizing congressional action and, also, a restriction on permissible state regulation in the absence of a conflicting federal enactment. *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 (1979). The Commerce Clause, as Justice Powell stated for the Court in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976), was "designed in part to prevent trade barriers that would undermined efforts of the fledging states to form a cohesive whole following their victory in the Revolution." The underlying principle of the Commerce Clause is that "our economic unit is the nation." *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537 (1949). This principle limits the States from regulatory measures which impede "free private trade in the national marketplace." *Reeves, Inc.* v. *Stake*, 447 U.S. 529, 437 (1980).

The Court has squarely held, however, that the limitations imposed upon the States in terms of their regulation

of the marketplace do not inhere when the State acts in the capacity as a market participant. *Hughes* v. *Alexandria Scrap Corp.*, *supra*; *Reeves, Inc.* v. *Stake*, *supra*. The Court made plain in *Hughes* that "nothing in the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp.*, *supra*, 441 U.S. at 810. Similarly in *Reeves, Inc.* v. *Stake*, *supra*, the Court stated that "there is no indication of a constitutional plan to limit the ability of states themselves to operate fully in the free market." *Id.* at 437.

In *Hughes* v. *Alexandria Scrap Corp.*, *supra*, the Court rejected a Commerce Clause challenge to a Maryland statutory scheme which was designed to remove abandoned vehicles from that state's roads and junkyards. The State offered a bounty for every abandoned automobile titled in Maryland which was converted into scrap. A provision of the Maryland law imposed documentation requirements for certain vehicles upon out-of-state scrap processors which were more exacting than those imposed upon Maryland processors. The practical effect of the requirement was to limit the availability of the abandoned hulks which remained in Maryland. As a result, the movement of the hulks in interstate commerce was reduced. *Id.*, 441 U.S. at 804. The Court held that the Maryland law did not violate the Commerce Clause. The Clause did not bar a State from participation in the market and restricting its trade to its own citizens or businesses.

The distinction between market participation and market regulation recognized in *Alexandria Scrap* was reaffirmed in *Reeves, Inc.* v. *Stake*, *supra*. There the Court rejected a Commerce Clause challenge to a South Dakota policy of selling cement produced at a State owned plant solely to

residents of South Dakota in times of shortage. As a seller of cement, the State was acting a a market participant. The general rule of *Alexandria Scrap* applied. *Id.*, 447 U.S. at 440. Furthermore, the Court rejected the contention that South Dakota was engaged in protectionism:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of State educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State. [*Reeves, Inc.* v. *Stake, supra*, 447 U.S. at 442].

Similarly in *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), summarily aff'd 409 U.S. 904 (1972), the Court sustained the constitutionality of Florida statutes and regulations which required that all public printing be done in Florida. Finding no violation of the Commerce Clause, the District Court stated that, "Trading regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not." *Id.* at 725. *See also People ex rel. Holland* v. *Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469, 479 (1975) (Illinois statute granting preference for Illinois resi-

dents as laborers on public works projects does not violate the Commerce Clause); *City of Phoenix* v. *Superior Court*, 109 Ariz. 533, 415 P.2d 454 (1973) (statute granting 5% price advantage to bidders on public contracts who have satisfactorily performed prior public contracts and have paid Arizona state and local taxes for two years prior to bidding does not violate Commerce Clause); *K.S.B. Technical Sales Corp.* v. *North Jersey District Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977) (New Jersey statute requiring use in government purchase contracts of materials produced in the United States is not in contravention of the Commerce Clause).

In this case, the Supreme Court of New Jersey correctly determined that the City of Camden, is awarding public contracts for construction, was acting in the capacity of market participant rather than market regulator. The City is "not regulating the flow of commerce between private parties" (App. A at 22a), but is instead merely establishing the terms upon which it deals with contractors engaged for the performance of contracts with the City. The Appellant suggests that Camden is regulating the primary relationship between the City and its contractor as well as the secondary relationship between the contractors and its employees. But, the hiring preference is not a regulation of the marketplace generally, it is specifically limited to the City's own contractual arrangements and has application only to the City's participation in the marketplace. The City's action therefore falls squarely within the holdings of the Court in *Reeves* and in *Alexandria Scrap*.

The Court below correctly noted that had the City of Camden chosen to perform its own construction work rather than have the work done by private contractor it could have required "that all employees on the job

be city residents." (App. A at 24a). See *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976). The Appellant must concede that under *American Yearbook Co.* v. *Askew, supra*, the City could constitutionally require that all of the work be performed by Camden contractors.* Given the breadth of the recognized power to condition municipal employment upon residency, and to provide a flat preference for local contractors, it is utterly illogical to contend that the Commerce Clause forbids the City of Camden from insisting that 40% of those hired by its contractors be residents of the City. A residency requirement for municipal employment would mandate that *all* workers be City residents. Implicit in a preference for the utilization of local contractors, as was the case in *American Yearbook*, is the clear understanding that the workforce will be largely, if not entirely, made up of local residents. Here, Camden has asked only that 40% of those employed be residents of the City, and there is nothing in the Commerce Clause which would bar the City from establishing this limited and reasonable requirement.

It should be added as well that in its decision below, the Supreme Court of New Jersey took note of the serious economic plight that has befallen the City of Camden (App. A at 24a). The Court referred to its recent decision in *Camden* v. *Skokowski*, 88 N.J. 304, 441 A.2d 741 (1982), wherein it was stated:

> Camden is one of the older urban areas in the State and is afflicted with the ills typical of these centers. *Its unemployment rate generally averages*

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* Under the applicable provisions of the New Jersey Local Public Contracts Law, N.J.S.A. 40A:1-1 *et seq.*, the City of Camden would be without statutory authority to limit competition on construction contracts to resident contractors. See N.J.S.A. 40A:11-13(b).

> *two or three times the national rate;* approximately 20% of the population consists of senior citizens; it has one of the highest uncollectible tax rates in the State, more than 13% of the houses are owned by the City; the residential tax base is small and consists of very modest homes; and industrial and commercial values have steadily shrunk over the last three decades. [*Id.* at 305, 441 A.2d at 742; emphasis added].

In adopting the hiring preference, the City Council noted the serious problem of unemployment confronting its residents particularly those among the large minority population of the City (App. C at 36a-37a). The situation in the City is no less pressing than that created by the cement shortage in South Dakota, a shortage which justified that State in limiting its cement sales to its own residents. *Reeves, Inc.* v. *Stake, supra.*

In sustaining the Camden ordinance against the contention that it contravened the Commerce Clause, the Supreme Court of New Jersey correctly refused to follow the recent decision of the Supreme Judicial Court of Massachusetts in *Massachusetts Council of Construction Employers* v. *Mayor of Boston,* —— Mass. ——, 425 N.E.2d 346 (1981), *cert.* granted *sub. nom. White* v. *Massachusetts Council of Construction Employees,* —— U.S. —— 102 S.Ct. 1273 (1982), wherein the Court held that a resident preference for municipal residents for city construction projects was a violation of the Commerce Clause. The Massachusetts Court failed to give sufficient weight to the City of Boston's proprietary interest in its own construction contracts, and declared the resident preference unconstitutional despite the plain fact that the City was acting in the capacity as a market participant rather than a market regulator. The Supreme Judicial Court of Massa-

chusetts distinguished *Reeves, Inc.* v. *Stake, supra*, and held that decision inapplicable because Boston's construction projects were not undertaken solely with City funds.

The decision in *Massachusetts Council* was, as the Supreme Court of New Jersey held, a departure from the reasoning in *Reeves*. The infusion of funds from sources other than the City's treasury is merely one consideration that will, as the Court said in *Reeves*, "be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." *Id.*, 447 U.S. at 439. The adjustment of these interests is a task "better suited for Congress than this Court." *Id.* Clearly, under *Reeves*, a local government retains the power under the Commerce Clause, absent a clear indication to the contrary from the Congress, to prefer its own residents in employment on its own construction projects despite the fact that funds other than the City's funds are being expended for the projects.

POINT III

The durational residency requirement in the Camden Ordinance is not violative of the Equal Protection Clause because it does not penalize the exercise of the right of interstate travel and is rationally related to legitimate governmental interests.

The Appellant also appeals from the portion of the judgment of the Supreme Court of New Jersey upholding the Camden resident preference against the contention that it violates the Equal Protection Clause of the Fourteenth Amendment. The Court below held that the right to seek employment on public construction projects undertaken on behalf of the City was not a fundamental right. The classification between residents and non-residents need not be

justified by a compelling state interest but would be sustained if it had a rational basis. The Supreme Court of New Jersey found such a rational basis in the severe unemployment in Camden, the need for economic revitilization and in the general principle that residents will supply an incentive for better preformance and advance the economy of the locality (App. A at 27a-28a). The decision of the Supreme Court of New Jersey is entirely consistent with the decisions of this Court.

In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court held that a state statute which denies welfare assistance to residents who have not resided in the state for one year preceding their application for assistance violated the Equal Protection Clause. U.S. Const., Amend. XIV. The durational residency requirements was viewed as penalizing those who had exercised their right to travel, and therefore could be sustained only if it served a compelling governmental interest. Notwithstanding its holding, the Court made clear that it was not establishing a rule of *per se* invalidity of durational residency requirements noting that some may be justified by compelling interests and some may not be penalties upon the exercise of the right of interstate travel. *Id.*, 398 U.S. at 638, n. 21. Durational residency requirements in the latter category would not be subject to strict scrutiny.

The Court's decisions in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) made clear that the exercise of the right of interstate travel will be deemed to have been penalized only if the durational residency requirement trenches upon a fundamental right or serves as a denial of a basic necessity of life. In *Dunn* v. *Blumstein, supra*, the durational residency requirement impaired the exercise of the fundamental right to vote. In *Memorial Hospital* v. *Maricopa*

County, supra, the Court concluded that medical care was, like the welfare assistance at issue in *Shapiro,* a basic necessity of life. These durational residency requirements were held violative of the Equal Protection Clause because the states had endeavored to justify the classifications on the basis of budgetary or record-keeping considerations "which were held insufficient to outweigh the constitutional claims of the individuals." *Sosna* v. *Iowa,* 419 U.S. 393, 408 (1975).

The durational residency requirement in the Camden ordinance does not impair the exercise of a fundamental right nor does it serve to deny a basic necessity of life. The ordinance permits those who have been residents of the City for a year to seek 100% of the available jobs on the Camden construction projects. Those who have resided in the City for less than a year may seek 60% of the available positions. The right to seek employment on the remaining 40% of the available positions is not, as the Supreme Court of New Jersey held, a fundamental right. In *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976), the Court held that the right of governmental employment is not a fundamental right. The right to employment can in no sense be deemed fundamental simply because the City has elected to have the work performed pursuant to contract rather than having the work performed directly.

Additionally, the inability of recently arrived residents to seek 100% as opposed to 60% by the positions on the Camden projects does not deny a basic necessity of life. As noted in *Memorial Hospital* v. *Maricopa County, supra,* the welfare payments at issue in *Shapiro* involved the immediate and pressing need for the preservation of the life and health of those unable to live without public assistance. *Id.,* 415 U.S. at 260 n.15, quoting from *Kirk* v. *Board of Regents,* 273 Cal. App.2d 430, 440, 78 Cal.

Rptr. 260, 266-267 (1969), app. dism. 396 U.S. 554 (1970). For the same reasons, the medical care affected by the durational residency requirement in *Memorial Hospital* was viewed as a basic necessity of life. *Id.* at 259. The Camden ordinance does not serve as a bar to employment generally nor does it establish an absolute bar to employment on the Camden construction projects. The right to seek employment on 100%, as opposed to 60%, of the jobs on the Camden projects simply cannot be said to involve an immediate and pressing need for the preservation of life and health.

It is clear therefore that the classifications in the Camden ordinance need not be "shown to promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. at 634. So long as Camden's durational residency requirement is rationally based it does not offend the Equal Protection Clause. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 528 (1959). The one year durational residency requirement for the 40% hiring preference is indeed rationally based. Those entitled to the preference will have demonstrated a commitment to the City by residing there a year or more. These individuals will thereby have an incentive for better performance. Moreover, the Camden residency preference was adopted with a view towards reducing the severe unemployment of those who reside in Camden. The unemployment problem is not new to a declining urban area such as Camden. The high unemployment rates may fairly be said to reflect the joblessness of many who have resided in Camden over the years and who lack the wherewithal to travel to other places where employment opportunities are greater. Given the rate of joblessness in Camden generally, it is unreasonable to assume that the ranks of the unemployed include large numbers of

people who have recently come to seek job opportunities. It is therefore reasonable for the City to assume that its unemployment problem is one that primarily affects its long-term residents. It is rational for the City to establish a limited hiring preference with a durational residency requirement of a year because if all of the job opportunities are taken by residents new to the City, who have come solely for the purpose of working on the City projects, there will be little prospect of lessening the severe unemployment situation in the City. Clearly, it is not irrational for the City of Camden to take this limited step in endeavoring to provide its long-term citizens with a small part of the benefits that flow from City-sponsored construction projects. The City's durational residency requirement is rationally based and, therefore, does not violate the Equal Protection Clause.

In summary, none of the constitutional issues raised by this appeal are of the requisite substantiality to warrant the Court's noting probable jurisdiction. The Supreme Court of New Jersey resolved the constitutional questions consistently with the decisions of this Court. The motion to dismiss should therefore be granted. Alternatively, if the Appellant's jurisdictional statement is treated as a petition for a writ of certiorari, the petition should be denied. The insubstantiality of the federal questions asserted make clear that there are no special and important reasons to justify plenary review by the Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for failure to present a substantial federal question, or in the alternative, if treated as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey,
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Motion.

Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal From the Supreme Court of New Jersey

APPELLANT'S REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
41 South Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

INTRODUCTORY STATEMENT

This reply brief is submitted on behalf of the United Building and Construction Trades Council of Camden County and Vicinity, which filed a jurisdictional statement on May 12, 1982, seeking to appeal that portion of a final judgment of the Supreme Court of New Jersey, reported at 88 N. J. 317 (1982), which upheld the validity, under the United States Constitution, of a municipal ordinance enacted by the City of Camden, New Jersey and approved by the State, which requires that at least 40 per cent of the employees hired by private contractors engaged in

public works construction projects for the City be municipal residents for one year prior to employment. The appellant contends that contrary to the holding of the New Jersey Supreme Court, this ordinance violates the Privileges and Immunities, Commerce and Equal Protection Clauses of the United States Constitution. This reply brief is being filed solely to call the Court's attention to its recent decision in *Zobel v. Williams*, — U. S. —, 102 S. Ct. 2309 (1982), and particularly the concurring opinion of Justice O'Connor therein, which addresses, and rejects, the Privileges and Immunities analysis proffered by the appellees in this matter. The appellant incorporates by reference herein, the statement of the case and constitutional arguments discussed in its jurisdictional statement filed previously.

ARGUMENT

I. A Local Ordinance Which Discriminates Against Out-of-State Residents by Denying Them Access to a Significant Portion of Private Employment Construction Jobs on Public Works Projects Is Not Immune From Review Under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State.

In defense of the Camden ordinance, the appellees argue that since the relevant discrimination is between municipal and non-municipal residents, the distinction is not based on state citizenship but between classes of state residents; thus, it is asserted, the Privileges and Immunities Clause is not implicated. Justice O'Connor in her concurring opinion in *Zobel v. Williams, supra*, rejected such a narrow reading of the Privileges and Immunities Clause.

In *Zobel v. Williams, supra*, this Court struck down as unconstitutional an Alaskan plan to distribute a portion of state revenues according to length of residency within the State. Chief Justice Burger, writing for the majority, found such a statute violative of the Equal Protection Clause, as Alaska failed to show any valid state interests rationally related to a distribution scheme based on the duration of state citizenship.

In a concurring opinion, Justice O'Connor would have struck down the statute based upon the Privileges and Immunities Clause. In her opinion, Justice O'Connor rejects the very argument made by the appellees in the instant case, that the Privileges and Immunities Clause applies exclusively to discrimination between residents of different states. Rather, she indicates that the Clause

also applies to discrimination among classes of residents within the same state:

> It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and non-residents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them . . . The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable terms than those who arrived earlier. *The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that 'the citizen of State A who ventures into [Alaska]' to establish a home labors under a continuous disability.* — U. S. at —, 102 S. Ct. at 2321 (emphasis added).

In the case at bar, the fact that some in-state residents as well as all out-of-state residents are disadvantaged does not immunize the Camden ordinance from review under the Privileges and Immunities Clause, as the Camden ordinance classifies job applicants based upon their place of residence. The effect of the ordinance is to deny a significant portion of job opportunities for private employment on public construction projects by reason of an employee's State of residence. It is precisely this kind of discriminatory conduct which is at the core of the Priv-

ileges and Immunities Clause. The discrimination worked against non-New Jerseyans by the Camden ordinance is not eliminated or ameliorated by the fact that other New Jerseyans, who are not residents of Camden, are similarly victimized.

By its very terms, the Privileges and Immunities Clause is not confined to discriminatory actions taken by the States alone, but ensures that no person shall suffer prejudice by reason of his State of residence. The Clause is designed "to place the citizens of each State upon the same footing with citizens of other States, as far as the advantages resulting from citizenship in those states are concerned." *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978).

We have not located a single authority which has held a municipal ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, the Privileges and Immunities Clause has invalidated local ordinances, regardless of the fact that such ordinances may have also burdened other in-state residents. *See e.g.*, *Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance fixing higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (held that ordinance imposing higher licensing fees on non-county residents is invalid under the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives non-residents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182

Pa. St. 630, 38 Atl. 356 (1897) (license fee which exempts peddlers residing in the county violates the constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *Fecheimer v. City of Louisville*, 84 Ky. 306, 309, 2 S. W. 65, 66 (1886) ("the fact that its provisions [of a municipal ordinance] apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it."); *cf., Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents is held to violate both the Privileges and Immunities Clause as well as federal and state equal protection guarantees).

Moreover, in an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 354, n. 4 (1951), that it is "immaterial" that the Madison ordinance which excluded from distribution within the City any milk not locally produced, subjected some intra-state concerns to the same discriminatory treatment as firms from out of state. The critical element in finding impermissible discrimination in *Dean Milk* and in the case at bar is that in both instances all out-of-state residents are subject to discrimination, by being denied access to a local market and selected local residents are beneficiaries of this discrimination, based solely on their State of residence. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden, that some New Jersey residents are also burdened.

The purposes of the Privileges and Immunities Clause are no less implicated when the discrimination is accomplished by means of a municipal ordinance, rather than via a state law. When a municipality acts, it does so by virtue of the measure of state authority with which it is clothed. To permit the City of Camden to enact an ordinance barring all non-New Jersey residents from employment on public works construction projects with the City grants it greater constitutional authority than its parent, the State. Such a result would encourage the enactment of similar ordinances by every municipality within a State to accomplish the same objective which, if effected by a state statute, would be deemed unconstitutional under the Clause. The effects of such discriminatory legislation are as devastating when enacted in piecemeal fashion as when adopted on a state-wide basis. The salutary goals of the Privileges and Immunities Clause would be frustrated if it was rendered impotent by such back-door Balkanization.

In making nonresidency an improper premise for locating a special burden, the Privileges and Immunities Clause implicates "not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U. S. 656, 662 (1975). To permit the adoption of the Camden resident preference merely invites out-of-state municipalities to protect their own residents by enactment of similar protectionist ordinances, even though "to prevent retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Id.* at 662-63.

A municipality may not require private contractors to restrict job opportunities in public works construction projects to its own citizens. To uphold the constitutionality of the Camden resident preference ordinance would significantly compromise the underlying vision of the

Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to deny appellee's motion to dismiss, note probable jurisdiction of this appeal and resolve the substantial federal question submitted herein.

Respectfully submitted,

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

Office-Supreme Court, U.S.
FILED
MAY 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2110

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Appellees

BRIEF OF APPELLANT

On Appeal from the Supreme Court of New Jersey

Steven K. Kudatzky
James Katz
Hilary B. Klein
TOMAR, PARKS, SELIGER, SIMONOFF and ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREET, PHILA., PA 19123 (215) 925-5500

QUESTIONS PRESENTED

1. Does a municipal ordinance which excludes all out-of-state residents from access to a significant portion of private employment opportunities within the municipality violate the Privileges and Immunities Clause of the United States Constitution?

2. Does a municipal ordinance which requires an applicant to have been a municipal resident for a year before being granted access to a significant portion of private employment opportunities violate the Equal Protection Clause of the United States Constitution?

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OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N.J. 317, 443 A.2d 148 (1982) and appears in the Appendix to appellant's Jurisdictional Statement at A1-A32.[1]

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and a Jurisdictional Statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on March 7, 1983, ___ U.S. ___, 103 S. Ct. 1270 (1983). This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution, Article IV, §2, Cl. 1:

"The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Fourteenth Amendment, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutionality is at issue herein is set forth in its entirety at A36-A58. In relevant part, it provides as follows:

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1. "A" followed by a page number refers to the Appendix to appellant's Jurisdictional Statement and constitutes the Joint Appendix for this matter.

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.[2]

C. IV. *Developer/Contractor's Contr. ·ng Obligations.*

> a. The developer/contractor to whom this ordinance is applicable, shall submit to all contractors and sub-contractors copies of this ordinance and shall make compliance with it, a specification of all bids. The developer/contractor shall require that by submitting a bid, a contractor or sub-contractor certifies that he/she will comply with the requirements of this ordinance.[3]
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.[4]

VII. *Union Statements.*

When a contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such

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2. A54-A55.
3. A40.
4. A56.

contractor shall submit with his/her bid a statement signed by an authorized union official, in which the union agrees as follows:

1. Said union is aware of the terms, conditions and goals of the within ordinance.

2. Said union is aware of the position of the City of Camden as the third party beneficiary with regards to the right to recover monetary damages on behalf of those adversely affected by non-compliance with the within ordinance.

3. Said union shall make a good faith attempt to assist the contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance . . .[5]

VIII. *Sub-contractors.*

The developer shall require that each prime contractor is responsible for the performance of his sub-contractors in the implementation of the aforementioned equal employment requirements during the performance of the contract. Whenever the contractor sub-contracts a portion of the work on the project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he were the contractor . . .[6]

I. *Definitions.*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence.[7]

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5. A45.
6. A46.
7. A38.

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N.J.S.A. 10:5-32 and 36(c) and N.J.A.C. 17:27-6.5.[8]

STATEMENT OF THE CASE

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as "the Council") seeks review of a judgment of the Supreme Court of New Jersey (A1-A32), which upheld the constitutionality of a resident preference ordinance, enacted by the City of Camden, New Jersey and approved by the State, which requires that at least forty per cent of the private employees hired by private contractors and sub-contractors engaged in public works construction projects for the city be municipal residents for one year prior to employment.[9]

The Council is a non-profit association of labor organizations which represent private employees in the building and construction trades in Camden, Burlington, Gloucester, Salem and Cumberland Counties in New Jersey. Over one-third of the unions represented by the Council have offices outside of New Jersey in Pennsylvania and Delaware. Due to its location on the Delaware River, immediately across from Philadelphia, Pennsylvania, Camden, New Jersey is readily accessible to residents of both Pennsylvania and Delaware. Employees who are members of the unions which comprise the Council include persons who reside in the City of Camden, persons who reside in New Jersey but outside

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8. A62.

9. In the same opinion, the New Jersey Supreme Court also upheld a challenge to the Camden City ordinance which established a twenty-five per cent minority hiring goal for employees engaged in public works construction projects. The appellant is not appealing that portion of the lower court's decision.

the City of Camden and persons who reside outside the State of New Jersey.[10] These individuals are employed by various private construction contractors and sub-contractors, work in all counties where the Council has territorial jurisdiction and have performed and will continue to seek to perform work on construction projects in the City of Camden. Many are "steady hands" who regularly work for such construction industry employers and move with them from project to project, and many perform extremely specialized tasks.

The Camden resident preference ordinance was enacted pursuant to the 1975 amendments to the New Jersey Law Against Discrimination, which sought to establish a comprehensive affirmative action program in the awarding of public works contracts. *L.* 1975, C. 127, N.J.S.A. 10:5-31 to 38. Under this state statute, a prospective public works contractor is required to formulate and submit for approval to the New Jersey Department of the Treasury "his or its affirmative action program whereby he or it guarantees minorities employment in all employment categories***." N.J.S.A. 10:5-34. No public works contract can be awarded by the state, county, municipality or other political subdivision nor any monies paid thereunder to any prospective contractor "who has not agreed and guaranteed to afford equal

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10. It should be noted that the Council, an unincorporated association, is not a legal entity apart from its members, *see Harker v. McKissock*, 12 N.J. 310, 96 A.2d 660 (1953). Moreover, this Court long has recognized that an association may initiate litigation as the representative of its members, as long as it alleges that one or more of its members is suffering immediate or threatened injury as a result of the challenged action. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 511 (1975); *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). *See also Crescent Park Tenants Association v. Realty Equities Corp. of New York*, 58 N.J. 98, 275 A.2d 433 (1971), in which the New Jersey Supreme Court also recognized an association's power to initiate litigation to vindicate the rights of its members.

opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N.J.S.A. 10:5-32.

As an alternative to state approval of all affirmative action plans submitted by prospective public works contractors, the statute authorizes state and local agencies to devise their own particular affirmative action programs and submit them for approval to the State Treasurer. N.J.S.A. 10:5-36(c). The New Jersey Department of the Treasury established by regulation a procedure by which any municipality or public agency may have its affirmative action construction programs so approved. N.J.A.C. 17:27-6.5. State approval of such programs supersedes the otherwise applicable statutory requirements with respect to the submission of affirmative action plans by prospective contractors on all public works contracts.[11] Thus, prospective contractors for public works contracts from a public agency with a state-approved affirmative action construction program need not have their own individual affirmative action programs approved by the State Treasurer on a contract-by-contract basis and need only comply with the requirements of the public agency's state-approved program.[12]

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11. Thus, N.J.A.C. 17:27-6.5(a) provides that an approved public agency program "shall exclusively establish the state affirmative action procedures and requirements which implement P.L. 1975, C. 127 *** as applied to construction contracts and subcontractors involving said public agency."

12. In determining whether to approve a public agency's affirmative action program, the State Treasury Department is guided by N.J.A.C. 17:27-6.5(b), which sets forth the minimum requirements for state approval. (A62). These criteria are a requirement that the public agency's construction contracts include certain mandatory contract language, a requirement that the public agency's bid advertisements state that bidders must comply with the affirmative action statute and a requirement that the public agency's minority employment percentage goal not be less than that set by the Treasury Department in N.J.A.C. 17:27-7.3 for the county in which the construction project is located. There is nothing in the

On July 24, 1980, the City of Camden, New Jersey adopted "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf of the City of Camden."[13] An amendatory ordinance was enacted on August 28, 1980.[14] The stated purpose of these ordinances was to relieve unemployment among City residents,[15] and the ordinances were designed to permit Camden to substitute its affirmative action program for the state mandate normally imposed on individual public works contractors.

The Camden ordinances provide in pertinent part, that "any party performing or offering to perform a contract for public construction in the City of Camden" (Article I, §1, Definitions of "Developer/Contractor"[16] "in hiring for jobs, shall make every effort to employ persons residing in the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden" (Amended Article IV, §b).[17] The ordinance applies "[W]herever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00 . . . [and] also appl[ies] to the development and construction of all residential housing of four (4) units or more."[18] The term "resident of the City of Camden" is defined as follows:

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state statute or regulations promulgated by the State Treasurer which provides for employment preference by private contractors based upon residency.

13. A36-A53.
14. A54-A58.
15. A36-A37.
16. A37.
17. A56.
18. A54-A55.

> "***any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [Article I, §5].[19]

Taken together, these provisions absolutely exclude out-of-state workers from forty per cent of all jobs in a major segment of the construction industry in Camden and mandate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions solely on the basis of an applicant's state and duration of residency, regardless of the individual's qualifications and unemployment status. The ordinance compels private developers, contractors, and subcontractors to have no less than forty per cent of their workforce on any particular municipal construction project consist of people who have lived in Camden for at least one year and have expressed an intention to make the City their permanent place of residence. Thus, an out-of-state resident is excluded from access to a significant segment of private sector employment opportunities, regardless of whether he or she is unemployed, a minority, or possesses more skills for the requisite job. Similarly, a long term Camden resident is preferred over a new arrival, solely on the basis of length of residence within the municipality.

In addition to private contractors, the ordinance applies to the hiring decisions of sub-contractors[20] and to referrals from union hiring halls,[21] neither of which

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19. A38.
20. A40, A46.
21. A45.

have any connection with the City of Camden. The affected individuals are *all private employees*, whose only connection with the municipality is the location of the job site. The stated terms of the ordinance apply to public works projects constructed by private parties, to any financial benefit conferred by the City excluding a property tax abatement, the fair market value of which exceeds $50,000.00, and also to the development and construction of all residential housing of four (4) units or more.[22]

Subsequent to its passage, the City submitted its ordinance to the Chief Affirmative Action Officer of the New Jersey Treasury Department for approval.[23] On November 24, 1980 the Chief Affirmative Action Officer, acting pursuant to N.J.S.A. 10:5-32 and 36(c) and N.J.A.C. 17:27-6.5, approved the Camden ordinances and designated the Affirmative Action Program of the City of Camden as a state-approved affirmative action construction program.[24] This program could not be implemented absent such authorization. As a result of this approval, all prospective private contractors, sub-contractors, and union hiring halls are required to comply with Camden's resident preference requirements.

The Council filed a timely notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of the action taken by the Chief Affirmative Action Officer and the constitutionality of the Camden ordinance. On June 19, 1981, the New Jersey Supreme Court accepted this appeal by direct certification pursuant to New Jersey Court Rule 2:12-1 and sub-

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22. A54-A55.

23. A59.

24. A60. Other than the exchange of correspondence and the submission of the ordinance, there were no other administrative proceedings prior to the approval of the ordinance. Appellant did not participate in any fashion in this administrative process, nor was it or any other party afforded an opportunity to do so.

sequently upheld the constitutionality of Camden's exclusion of out-of-state residents from access to a significant portion of private employment opportunities on construction projects within the City.

Although the Court recognized that the Camden ordinance involved the imposition of resident hiring quotas upon private employers, whereas previous decisions in the area have involved residency requirements for municipal employees, the Court did not believe that this distinction deprived the ordinance of its constitutional validity, either under the Privileges and Immunities Clause, Commerce Clause or Equal Protection Clause of the United States Constitution.[25]

SUMMARY OF ARGUMENT

The Camden resident hiring quota, by excluding all out-of-state residents from access to forty per cent of the jobs with private employers on public works construction projects and by limiting these job opportunities to municipal residents of a year or more, undermines the principles of equality of opportunity and national unification which are the very foundation upon which this Union was built. The invidious discrimination based on length and state of residency effected by the Camden ordinance is repugnant both to the Privileges and Immunities Clause of Article VI, §2, which was adopted to protect the rights of out-of-state residents, and the Equal Protection Clause, which protects the rights of all residents within a state.

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25. In view of this Court's recent decision in *White v. Massachusetts Council of Construction Employers, Inc.*, ____ U.S. ____, 103 S. Ct. 1042 (1983), which held that an executive order of the Mayor of Boston, which requires all construction projects funded in whole or in part by city funds to be performed by at least fifty per cent bona fide city residents, is immune from commerce clause scrutiny because Boston was acting as a market participant, appellant herein no longer presses its commerce clause challenge to the Camden ordinance.

The Privileges and Immunities Clause, esteemed to be the "basis of the Union,"[26] seeks "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), by insuring "to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Although the contours of the Clause are not fully developed, this Court has long recognized that the clause solicitously "secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." *Ward v. Maryland*, 70 U.S. (12 Wall.) 418, 430 (1871). Striking at this core objective of the Privileges and Immunities Clause to protect out-of-state residents' right to pursue their lawful trades, the Camden ordinance excludes all out-of-state residents from competing for forty per cent of the private jobs offered in a major segment of the construction industry. Moreover, because the excluded individuals are all private employees whose only connection with the municipality is the location of the job site, Camden's hiring quota represents an attempt by a governmental entity to interfere with private contractual relations to further a protectionist purpose, by exercising its financial leverage and immense power to exclude nonresidents from access to significant *private* employment opportunities.

Despite the fact that the Camden ordinance denies all out-of-state residents the right to compete for private employment jobs on public works construction projects, the New Jersey Supreme Court ruled that it did not violate the Privileges and Immunities Clause.[27] Without re-

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26. THE FEDERALIST NO. 80 at 478 (A. Hamilton) (C. Rossiter ed. 1961)

27. A.26.

lying on either a factual record or precedent, the Court reasoned that because the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden that it does out-of-state residents . . . it does not violate any privilege of state citizenship" and is therefore immune from constitutional review under the Privileges and Immunities Clause.[28] By so holding, the New Jersey Supreme Court has redefined the Privileges and Immunities Clause to apply solely to the actions of a state itself and immunized discriminatory treatment of all out-of-state residents, as long as the discrimination is effected by a municipal ordinance.

The Court recognized that a state is constitutionally powerless to compel private parties to prefer nonresidents on public works construction,[29] yet its holding permits a state to induce indirectly through municipal enactments the very discriminatory conduct which a state is precluded from engaging in directly. Moreover, its decision permits the cities of New Jersey and every other state to independently attempt to accomplish what the state cannot — excluding out-of-state residents from access to a significant portion of employment opportunities. The concerns and purposes of the Privileges and Immunities Clause are no less implicated when the exclusion is accomplished by local ordinance, rather than by state action. The "one Nation" which the Privileges and Immunities Clause was designed to create out of "a collection of independent, sovereign States," *Toomer v. Witsell, supra*, 334 U.S. at 395, could be just as easily destroyed by independent cities acting to further their own parochial interests as by independent, sovereign states. Permitting Camden to penal-

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28. There was absolutely no evidence in the record nor did the New Jersey Supreme Court point to any to justify its determination that the Camden residency requirement affects more New Jersey residents not living in Camden than it does out-of-state residents.

29. A26, n.8.

ize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution, and the Privileges and Immunities Clause in particular, was designed to eliminate. *Austin v. State of New Hampshire*, 420 U.S. 656, 667 (1975).

Once it is established that the Camden resident hiring quota is subject to Privileges and Immunities scrutiny, then the City must show that its ordinance passes the two-pronged Privileges and Immunities test adopted by this Court. Under established principles, the ordinance does not survive constitutional muster, because Camden has not demonstrated either that nonresidents constitute a "peculiar source of the evil" at which the ordinance is aimed, *Hicklin v. Orbeck*, 437 U.S. 518, 525-526 (1978), or that the discrimination practiced bears a substantial relationship to the particular evil that the nonresidents are said to present. *Id.* 526.

Finally, unlike the Commerce Clause, the Privileges Immunities Clause imposes a direct limitation on governmental enactments. As a charter of personal rights, the Clause constitutes an express denial of the right of any state to make residency alone the basis of any act of discrimination. Thus, the distinction between market participation and market regulation applied when considering municipal enactments under the Commerce Clause,[30] is inapplicable to Privileges and Immunities Clause analysis. Rather, the Clause by its very terms applies to *all* governmental action, regardless of the characterization of the government's role in the market place.

Even if the Camden resident hiring quota does not violate the Privilege and Immunities Clause, by restricting the very means of economic subsistence, *i.e.*, access to employment opportunities, to long term Camden residents, the City's ordinance impinges on the fundamen-

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30. *White v. Massachusetts Council of Construction Employers, Inc.* ____ U.S. ____, 103 S.Ct. 1042 (1983).

tal constitutional right of interstate travel and thereby violates the Equal Protection Clause.

Over the past fifteen years this Court has consistently invalidated durational residency requirements which have been found to impermissibly penalize the fundamental right to interstate travel. *See, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In striking down such classifications, this Court has stressed that "they impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right," *Dunn v. Blumstein, supra*, 405 U.S. at 342. These durational residency requirements create two classes of needy residents, distinguishable only on the basis of length of residency. Thus, in the instant case, Camden is discriminating between new and long term residents, similarly situated in every respect, except that the former individuals are denied access to employment opportunities merely because they have recently exercised their right to travel.

Moreover, the new residents' right to travel is penalized when they are deprived of vital benefits such as welfare, *Shapiro v. Thompson, supra*, and medical care, *Memorial Hospital v. Maricopa County, supra*. Access to employment opportunities is similarly essential; this Court repeatedly has recognized that access to the common occupations of life is of the very essence of personal freedom and opportunity which the Fourteenth Amendment was adopted to secure. Indeed, this Court could not logically find that it is unconstitutional to impose a durational residency requirement on an individual seeking welfare, but it is permissible to impose the very same requirement on someone seeking access to employment in order to escape welfare.

Because such durational residency requirements penalize the fundamental right to interstate travel, they must be necessary to achieve a compelling governmen-

tal interest, *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 258. Although the City's interest in reducing unemployment may be laudable, it is not compelling, because the City seeks to regulate purely private employment through its ordinance. In addition, unless the means Camden has adopted to reduce unemployment are precisely tailored to accomplish the City's stated objectives, these means are not considered necessary. Camden's means are not precisely or even remotely tailored to achieve its goal of reducing unemployment, as the ordinance is targeted to benefit long term residents, rather than the long term unemployed. By making some citizens more equal than others in the area of access to employment opportunities, Camden has employed means repugnant to the fundamental constitutional rights guaranteed by the Equal Protection Clause.

ARGUMENT

I. BY EXCLUDING OUT-OF-STATE RESIDENTS FROM ACCESS TO FORTY PER CENT OF THE JOBS WITH PRIVATE EMPLOYERS ON PUBLIC WORKS CONSTRUCTION PROJECTS, THE CAMDEN RESIDENT HIRING QUOTA VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Constitutional Ban on Discrimination Against Out-of-State Residents Embodied in the Privileges and Immunities Clause Was Adopted as an Instrument of National Unification.

The Privileges and Immunities Clause of Article IV, §2 provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Intended "to help fuse into one Nation a collection of independent sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) the Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's

residents." *Hicklin v. Orbeck*, 437 U.S. 518, 523-24 (1978). The purpose of the Clause, as described in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) is

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

The Clause was designed both expressly to limit a state's power to discriminate against nonresidents as well as to foster national unity:

> The primary purpose of this clause, like the clauses between which it is located — those relating to full faith and credit and to interstate extradition of fugitives from justice was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.

Toomer v. Witsell, *supra*, 334 U.S. at 395-96.

Although not extensive, the available evidence of the Framers' intent in drafting the Privileges and Immunities Clause indicates that the Clause was designed as an instrument of national unification.[31] The Clause is

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31. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 UNIV. OF PA L. REV. 379, 383 (1979). The concern to limit a state's power to discriminate against inhabitants of other states antedated the Constitution. As one commentator elaborated: "In 1776, even before the American colonies became states, a committee of the Continental

derived from the fourth article of the Articles of Confederation, which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

19 JOURNALS OF THE CONTINENTAL CONGRESS 214-15 (G. Hunt ed. 1912).

Finding that the discrimination by states against "outlanders," at which this Clause was aimed, was not eradicated during the period of the Confederation, the Framers carried over the provision "into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation." *Austin v. State of New Hampshire*, *supra*, 420

Congress, appointed to propose articles of confederation, drafted two articles protecting the inhabitants of one colony from discrimination by another. *See* Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 2-5 (1967). English law protective of 'alien friends' is traced to the Magna Carta in R. HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 9-13 (1918). Howell futher claimed that, by the time of the Articles of Confederation, 'independently of any constitutional provision, the citizens of the thirteen original states were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State.' *Id.* 13. In his view, the constitutional provisions were drafted to extend the scope of these protections and render them more secure. *Id.*" Varat, *State Citizenship and Interstate Equality*, 48 UNIV. OF CHI. L. REV. 487 n.1 (1981).

U.S. at 660-61 (citations omitted).[32] Charles Pickney of South Carolina, the recognized author of the Privileges and Immunities Clause, *Id.* 661 n.6, assured the Constitutional Convention that the Clause is "framed exactly upon the principles of the 4th article of the present confederation . . ." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (1911).[33] Moreover, because the delegates to the Constitutional Convention adopted virtually without debate the Privileges and Immunities Clause submitted to them by the Committee of Detail,[34] it is reasonable to infer that

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32. The internecine warfare between the states which led to the Federal Constitutional Convention of 1787 is familiar to every reader of history and needs no detailed description here. *See* G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION (1882); J. FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY (1888); A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 (1924); C. WARREN, THE MAKING OF THE CONSTITUTION (1937). James Madison in a commentary on the plan of union proposed by William Paterson of New Jersey wrote: "Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other states] are entitled to equality of privileges by the Articles of Confederation." 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 317 (1911), cited in *Austin v. New Hampshire*, *supra*, 420 U.S. at 660, n.5.

33. Similar sentiments were reflected in the *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 75 (1873), in which the Court compared the Privileges and Immunities Clause enunciated in the Articles of Confederation with that of the Constitution:

> There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

34. III. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 1786-1870, 56th Cong., 2d Sess., Doc. No. 529 at 456, 634, 731 (1900).

the specific provisions of the Articles of Confederation upon which the Clause undoubtedly is based were widely understood to form the basis of the Clause.[35]

Despite its meager constitutional history, the Privileges and Immunities Clause has been considered of vital importance to national unification. Thus, Alexander Hamilton stressed that the Clause "may be esteemed the basis of the Union." THE FEDERALIST No. 80 at 478 (A. Hamilton) (C. Rossiter ed. 1961). Almost eighty years after the adoption of the Clause, this Court emphasized:

> 'It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.'
>
> Indeed, without some provision of this kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists. (citations omitted).

Paul v. Virginia, *supra*, 75 U.S. (8 Wall) at 180.

It is against these fundamental constitutional concerns of comity, unity and federalism that the Camden resident hiring quota must be tested.[36]

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35. *See* Simson, *Discrimination Against Nonresidents and The Privileges and Immunities Clause of Article IV*, 128 UNIV. OF PA. L. REV. *supra*, at 384.

36. Both this Court, as well as commentators, have suggested that the heightened scrutiny of the Privileges and Immunities Clause is necessary to protect nonresidents who are completely unrepresented in the decisionmaking body's legislative process and are political outsiders in the fullest sense. *See Austin v. New Hampshire*, *supra*, 420 U.S. at 662-663; J. ELY, DEMOCRACY AND DISTRUST (1981); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Simson, *Discrimination Against Nonresidents and the Privileges and Immuni-*

B. A Core Concern of the Privileges and Immunities Clause Is the Exclusion of Out-of-State Residents Seeking Access to Private Employment Opportunities within the City of Camden.

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin v. New Hampshire*, *supra*, 420 U.S. at 662. Thus, this Court consistently has struck down state statutes which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency as violative of the Privileges and Immunities Clause. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871) (Maryland statute regulating sale of goods in City of Baltimore violated the Privileges and Immunities Clause by requiring nonresident merchants to obtain licenses to practice their trade without requiring the same of similarly situated Maryland merchants, charging nonresidents higher license fees than Maryland merchants and prohibiting merchants from using nonresident salesman, other than their regular employees, to sell their goods in the City); *Toomer v. Witsell*, *supra*, (invalidating a South Carolina statute that required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (striking down a plan employed by the Territory of Alaska for the licensing of commercial fisherman which charged nonresidents forty-five dollars more for licenses than residents); *Doe v. Bolton*, 410 U.S. 179 (1973) (holding that a state criminal abortion statute which pro-

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NOTE — *(Continued)*

ties Clause of Article IV, 128 UNIV. OF PA. L. REV. *supra*, at 384-385.

hibits all abortions except those performed on bona fide state residents violates the Privileges and Immunities Clause by denying medical services to out-of-state residents); *Austin v. New Hampshire*, *supra*, (State commuter income tax falling exclusively on incomes of nonresidents and not offset by other taxes imposed on residents alone held violative of Privileges and Immunities Clause); *Hicklin v. Orbeck*, *supra*, (Alaskan statute which required that all contracts in connection with the construction of Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to nonresidents held violative of the Privileges and Immunities Clause in that it unreasonably discriminated against citizens of other states).

Consistent with the clear purposes and underlying objectives of the Privileges and Immunities Clause, this Court has long recognized that the Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." *Ward v. Maryland*, *supra*, 70 U.S. (12 Wall) at 430. Although the contours of the Privileges and Immunities Clause are not well developed, *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 380 (1978), and there has been some question whether the Clause requires equality of treatment with respect to all rights and privileges conferred by a state on its own citizens, or only those rights and privileges that might be termed "fundamental," *Id.* 381,[37] there has never been any question that "one of

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37. In the first major case interpreting the Privileges and Immunities Clause, Justice Bushrod Washington concluded that the Clause encompassed those privileges "which are in their very nature, fundamental," commenting:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the

the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of

NOTE—(Continued)

> citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1825). It has been suggested that Justice Washington's opinion reflected the jurisprudence of the day and was an attempt to impart the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 405-06 (1978). In *Paul v. Virginia*, *supra*, the Court limited the reach of the Clause and stressed that the measure of the right secured to nonresidents was the extent of the rights afforded by a state to its own citizens: "It was undoubtedly the object of the clause . . . to place citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Id.* 180. *See also Hague v. CIO*, 307 U.S. 496, 511 (1939) ("[it] has come to be the settled view that Article IV, §2 does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy.").

substantial equality with the citizens of that State." *Toomer v. Witsell, supra,* 334 U.S. at 396. This Court consistently has recognized that the right to engage in "common callings" *Id.* 403, and to pursue "ordinary livelihoods" *Id.* 408 (Frankfurter, J., concurring), is worthy of the safeguards of the Privileges and Immunities Clause.[38]

Indeed, many of this Court's most significant decisions invalidating state laws as violative of the Privileges and Immunities Clause arose in the context of state efforts to limit nonresidents' commercial and employment opportunities. *See, e.g., Ward v. Maryland, supra,* (sale of goods); *Toomer v. Witsell, supra,* (commercial fishing); *Mullaney v. Anderson, supra, (commercial fishing); Hicklin v. Orbeck, supra,* (employment on oil and gas pipelines). Similarly, state and federal courts have regularly struck down laws which interfere with an individual's right to engage in a chosen occupation solely because of residency.[39]

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38. Initially recognized in the Articles of Confederation ("the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . ."), the right of access by nonresidents to employment opportunities as a core concern of Privileges and Immunities Clause has been repeatedly stressed. *See, e.g., Corfield v. Coryell, supra,* 6 Fed. Cas. at 552 ("the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . ."); *Doe v. Bolton, supra,* 410 U.S. at 200 ("Just as the Privileges and Immunities Clause, Const. Art IV, §2, protects persons who enter other states to ply their trade . . . so must it protect persons who enter Georgia seeking medical services that are available there . . .") (citations omitted); *Hicklin v. Orbeck, supra,* 437 U.S. at 525 ("Ward [79 U.S. (12 Wall.) 418] thus recognized that a resident of one state is constitutionally entitled to travel to another state for purpose of employment free from discriminatory restrictions in favor of state residents imposed by the other states.")

39. Thus, courts have struck down laws which interfere with an out-of-state resident's right to engage in commercial fishing, *see, e.g., Tangier Sound Watermen's Assoc. v. Douglas,* 541 F. Supp. 1287 (E.D. Va. 1982); *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska, 1962); *Gospodonovich v. Clements,* 108 F. Supp. 234 (E.D. La.), *app. dismissed,* 344 U.S. 911 (1953); *Edwards v. Leaver,* 102

Even when this Court has held that allegedly discriminatory state laws are not repugnant to the Privileges and Immunities Clause, it almost invariably has

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NOTE — (*Continued*)

F. Supp. 698 (D.R.I. 1952); *Russo v. Reed*, 93 F. Supp. 554 (D. Maine 1950); *Steed v. Dodgen*, 85 F. Supp. 956 (W.D. Texas 1949); ferry boat operation, *District No. 1 Pacific Coast District, M.E.B.A. v. Ward*, 505 F. Supp. 98 (W.D. Wash. 1981) and public works construction, *Salla v. County of Monroe*, 48 N.Y. 2d 514, 399 N.E. 2d 909, 423 N.Y.S. 2d 878 (1979), *cert. denied sub nom., Abrams v. Salla*, 446 U.S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super 367, 437 A.2d 733 (Ch. Div. 1981), *aff'd.*, ___ N.J. Super ___ (App. Div. 1982), *app. pending*, ___ N.J. ___ (No. 20,700, 1983); *Mass. Council of Construction Employers, Inc. v. Mayor of Boston* ___ Mass. ___, 425 N.E. 2d 346 (1981) (striking down state statute, not appealed in *White v. Mass. Council of Construction Employers*, ___ U.S. ___ 103 S. Ct. 1042 (1983)); *Laborers Local Union No. 374 v. Felton Construction Company*, 98 Wash. 2d 121, 654 P.2d 67 (1982). Indeed, since this Court's holding in *Hicklin v. Orbeck*, the Privileges and Immunities Clause has been employed successfully to strike down residency requirements that discriminate against out-of-state applicants for admission to the bar. *See, e.g., Piper v. Supreme Court of New Hampshire*, 539 F. Supp. 1064 (D.N.H. 1982) (state residency requirement for practice of law violates Privileges and Immunities Clause); *Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D.S.D. 1982) (requirement that applicant for admission to practice law in South Dakota must be state resident violates Privileges and Immunities Clause); *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N.D. Ala. 1981) (Alabama rule requiring applicant to be bona fide resident at the time of certification to sit for the bar examination contravenes Privileges and Immunities Clause); *Noll v. Alaska Bar Association*, 649 P.2d 241 (Alaska 1982) (Alaska Bar Rule which requires that applicant for admission to State Bar be domiciled in Alaska violates Privileges and Immunities Clause); *Sargus v. West Virginia Board of Law Examiners*, 294 S. E.2d 440 (W. Va. 1982) (requiring applicant for admission to State Bar to be resident more than 30 days prior to taking Bar examination is discriminatory against nonresidents in violation of the Privileges and Immunities Clause); *Sheley v. Alaska Bar Association*, 620 P.2d 640 (Alaska 1980) (invalidates rule which requires applicant to establish domicile in Alaska at least 30 days before the bar examination); *Gordon v. Committee on Character and Fitness*, 48 N.Y. 2d 266, 397 N.E. 2d 1309, 422 N.Y.S. 2d

stressed that the challenged laws do not burden nonresidents in their efforts to earn a living.[40]

The City of Camden, by absolutely excluding all out-of-state residents from even competing for forty per cent of the private jobs offered in a major segment of the construction industry, has enacted an ordinance which not only discriminates against out-of-state residents on its face, but also imposes upon them a burden which strikes at the very core of the protection of the Privileges and Immunities Clause. The City is seeking to condition employment with private contractors solely on length and location of residency in Camden, and by thus restricting employment opportunities, it is regulating wholly private relationships in favor of parochial interests. Surely, access to private employment is the kind of "privilege" and "immunity" which "bear[s] upon the vitality of the Nation as a single entity. . . ." and the distinction imposed by the City, which hinders "the formation, the purpose, or the development of a single Union. . . ," *Baldwin v. Fish and Game Commission of Montana, supra*, 436 U.S. at 383, warrants careful scrutiny under the Privileges and Immunities Clause.

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641 (1979) (strikes down New York rule as violative of the Privileges and Immunities Clause which requires proof of state residency for at least six months prior to submission of application for admission to the bar). Unlike *Mullaney v. Anderson, supra*, which imposed a forty-five dollar ($45) higher licensing fee on nonresidents, or *Ward v. Maryland, supra*, *Toomer v. Witsell, supra*, or *Steed v. Dodgen, supra*, which imposed substantially increased fees on nonresidents, the Camden resident preference ordinance absolutely excludes out-of-state residents from access to forty per cent of the private jobs on public works construction.

40. *See, e.g., Baldwin v. Montana Fish and Game Commission, supra*, 436 U.S. at 388 (1978) (upholding higher license fees for nonresident elk hunters):

> Elk hunting by nonresidents in Montana is a recreation and a sport. . . . It is not a means to a nonresident's livelihood. . . . Appellant's do not — and cannot — contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel.

C. A Local Ordinance Which Discriminates Against Out-Of-State Residents by Denying Them Access to a Significant Portion of the Jobs Offered by Private Employers Engaged in Public Works Construction Projects Is Not Immune From Review under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State.

Although the Camden ordinance unequivocally denies out-of-state residents access to forty per cent of the private employment jobs on public works construction projects, the New Jersey Supreme Court ruled that it nonetheless did not violate the Privileges and Immunities Clause. Without relying on either a factual record or precedent, the Court reasoned that because the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents . . . it does not violate any privilege of state citizenship" and is therefore immune from constitutional review under the Privileges and Immunities Clause.[41] The lower court's holding grants a municipality, a political subdivision of a state, greater authority than the state itself to discriminate against out-of-state residents and encourages the states to induce indirectly that which they cannot constitutionally mandate directly. By effectively removing all municipal conduct from scrutiny, such a holding undermines the vision of and purpose behind the Privileges and Immunities Clause by encouraging economic balkanization and parochial retaliation, as the political subdivisions of the several states eagerly will seek to accomplish the discrimination forbidden to the states themselves.

It is well established that what would be unconstitutional if done directly by a state can no more readily be accomplished by a political subdivision at a state's direction. *See Memorial Hospital v. Maricopa County*, 415

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41. A26.

U.S. 250, 256 (1974). Moreover, a municipality is a creature of the state legislature and has no greater powers than those afforded to the state:

> [M]unicipalities have no inherent right of self-government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. (citation omitted)

City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923).[42] A holding that a municipality, whose existence and powers are derived from the state, may enact a law discriminating against out-of-state residents, would grant a municipality greater constitutional power than its parent, a state.[43]

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42. *Cf. Borough of Sayre v. Phillips*, 148 Pa. 482, 24 A. 76 (1892), in which in striking down an ordinance which exempted borough residents from its peddling licensing requirements, the Pennsylvania Supreme Court stressed:

> When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation . . . It can have no better right to adopt discriminating trade regulations than the state has. 148 Pa. at 489, *Id.*

43. The extent of state control over city power and property was described by this Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907):

> The State . . . at its pleasure may modify or withdraw all [city] powers, may take without compensation [city] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body,

This Court has recognized that a state may not limit out-of-state residents' access to private employment opportunities.[44] Recently, state courts in New Jersey and other jurisdictions have struck down as violative of the Privileges and Immunities Clause state statutes which granted an absolute job preference to state residents on all public works construction projects.[45] The municipal ordinance of the City of Camden, which was approved by the State of New Jersey, permits the City to engage in the very type of discriminatory activity which is proscribed for the State.[46]

NOTE — (Continued)

conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. . .

The New Jersey Supreme Court consistently has recognized the limited nature of the power of the State's municipalities. *See, e.g., Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212, 225, 416 A.2d 334, 341 (1980); *Ringlieb v. Parsippany-Troy Hills Tp.*, 59 N.J. 348, 283 A.2d 97 (1971).

44. *See, e.g., Hicklin v. Orbeck, supra; Mullaney v. Anderson, supra; Toomer v. Witsell, supra; Ward v. Maryland, supra.*

45. *See, e.g., Laborers Local Union No. 374 v. Felton Construction Company, supra; Neshaminy Constructors, Inc. v. Krause, supra; Salla v. County of Monroe, supra; Mass. Council of Construction Employers v. Mayor of Boston, supra.* In *Mass. Council of Construction Employers*, Massachusetts did not appeal that portion of the opinion which invalidated the state public works construction resident preference. *But see People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469 (Ill. 1975), in which the Illinois Supreme Court held that a one year state residency requirement for preference on public works construction projects violates the Equal Protection Clause, but a mere preference for Illinois residents does not violate the Privileges and Immunities Clause. That case was decided prior to this Court's holding in *Hicklin v. Orbeck, supra*, however, and its continuing validity is open to question.

46. Ironically, N.J.S.A. 34:9-2, the State resident preference statute struck down in *Neshaminy Constructors Inc. v. Krause, supra*, applies to the construction of any public work for the state, municipality or any subdivision thereof. Thus, the statute reads in pertinent part:

In the construction of any public work for the state, or any

Moreover, under the lower court's interpretation, a state may circumvent the sanctions of the Privileges and Immunities Clause merely by authorizing or directing each locality to undertake the very kind of discriminatory conduct which a state itself is prohibited from engaging in directly. That which a state is constitutionally powerless to command directly, it is not permitted to induce indirectly. "Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority." *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 108 n.5 (1967). (citations omitted).[47]

Not only would the lower court's holding enable a state to induce indirectly that which it cannot command directly, but also it would encourage the municipalities in New Jersey and of every other state independently to decide to accomplish that which the state cannot — achievement of an insulated and isolated economic system under which residents of each city in New Jersey can work in their own city and inhabitants of Delaware

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county, city, town, township or borough, or other municipal corporation or any board, committee, commission or officer thereof . . . preference in employment thereon shall be given to citizens of the state of New Jersey who have resided and maintained domiciles within the state for a period of not less than one year immediately prior to such employment . . .

Although the New Jersey Supreme Court acknowledges the holding of *Neshaminy* (A26, n.8), there is no indication that its holding is being overturned *sub silentio*. Thus, as the law now exists in New Jersey, it is unlawful for a municipality to require private contractors to prefer New Jersey residents but permissible for it to require contractors to prefer city residents.

47. For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a constitution, an act of the legislature, or an act by any subordinate instrumentality of the State exercising delegated legislative authority like an ordinance of a municipality or an order of a commission. (citations omitted)

Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919).

and Pennsylvania can work nowhere in New Jersey. While Camden residents can work in Camden, Newark residents can work in Newark and Trenton residents can work in Trenton, the out-of-state resident is placed in the same position as he would be under the unconstitutional State enactment — restricted, if not precluded, from access to private employment on public works construction. The "one Nation" which the Privileges and Immunities Clause was designed to create out of "a collection of independent, sovereign States," *Toomer v. Witsell*, *supra*, 334 U.S. at 395, could be just as easily destroyed by independent municipalities acting to further their own parochial interests as by independent, sovereign states. The salutary goals of the Privileges and Immunities Clause would be frustrated if it were rendered impotent by such back-door balkanization.

Moreover, the Privileges and Immunities Clause effectively would be nullified if a law were immunized from scrutiny merely because it was enacted by a municipality, rather than by the state. For example, such a holding would permit a municipality to limit private employment to city residents and confine private medical care to citizens residing within the municipality. Similarly, under this logic, the Alaska Hire Act struck down in *Hicklin v. Orbeck* would have been saved if Anchorage, rather than the State of Alaska, had enacted the identical law. Such results are repugnant to the underlying objectives of the Clause.[48]

In addition, because the underlying objective of the Clause is to protect out-of-state residents from discrimination, the fact that some in-state residents as well as all out-of-state residents are disadvantaged does not immu-

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48. This Court has emphasized that because nonresidents are unrepresented in the decision making body's political processes, Privileges and Immunities Clause challenges are subjected to a "substantially more rigorous" standard of review to "reflect an appropriately heightened concern" for the integrity of the Privileges and Immunities Clause. *Austin v. State of New Hampshire*, *supra*, 420 U.S. at 662-63.

nize the Camden ordinance from constitutional review.[49] The exclusion effectuated against all non-New Jersey residents by the Camden ordinance is not eliminated or ameliorated by the fact that other New Jersey residents who are not residents of Camden are similarly victimized.

Recently, Justice O'Connor in a concurring opinion in *Zobel v. Williams*, ____ U.S. ____, 102 S.Ct. 2309 (1982), implicitly rejected the narrow view adopted by the New Jersey Supreme Court that the Privileges and Immunities Clause is not implicated when an ordinance distinguishes between classes of state residents as well as excludes all out-of-state residents. In *Zobel v. Williams, supra*, this Court struck down as unconstitutional an Alaskan plan to distribute a portion of state revenues according to length of residency within the State. Chief Justice Burger, writing for the majority, found the statute violative of the Equal Protection Clause because Alaska failed to show any valid state interests rationally related to a distribution scheme based on duration of state citizenship.

In a concurring opinion, Justice O'Connor would have invalidated the statute on the basis of the Privileges and Immunities Clause. In her opinion, Justice O'Connor rejected the argument that the Privileges and Immunities Clause applies exclusively to discrimination between residents of different states. Rather, she indi-

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49. The reach of the Clause has never been limited to its literal language. Thus, in *Mullaney v. Anderson, supra*, the Privileges and Immunities Clause was invoked to strike down a discriminatory licensing fee of the Territory of Alaska, even though the Clause specifically refers to "state" action.

Similarly, although the Clause is limited to protecting rights of citizens, this Court recently stressed in *Hicklin v. Orbeck, supra*, 437 U.S. at 524 n.8: "It is now established that the terms "citizen" and "resident" are 'essentially interchangeable . . .' for purposes of analysis of most cases under the Privileges and Immunities Clause of Art. IV, §2" (citations omitted).

cated that the Clause also applies to discrimination among classes of residents within the same state:

> It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them . . . The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable term than those who arrived earlier. *The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that 'the citizen of State A who ventures into [Alaska]' to establish a home labors under a continuous disability.* ____ U.S. at ____, 102 S. Ct. at 2320-2321 (emphasis added).

We have not located a single authority which has held a local ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, courts have invalidated local ordinances under the Privileges and Immunities Clause, regardless of the fact that such ordinances also may have burdened other in-state residents.[50] Thus, almost a century ago, the Kentucky Su-

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50. *See, e.g., Ward v. Maryland, supra; Ward Baking Co. v. City of Fernandina*, 29 F.2d 789 (S.D. Fla. 1928) (ordinance fixing

preme Court, in striking down a municipal ordinance which imposed a higher licensing tax on non-city residents, rejected the argument that a local ordinance is valid if it burdens some state residents as well:

> The ordinance under which this payment was exacted applies to the resident of the State as well as the non-resident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed, and the fact that its provisions apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it.

NOTE — *(Continued)*

higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 A.570 (1918) (ordinance imposing higher licensing fees on noncounty residents is invalid under the Privileges and Immunity Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N.W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives nonresidents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182 Pa. 630, 38 A.356 (1897) (license fee which exempts peddlers residing in the county violates the Constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N.E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *McGraw v. Town of Marion*, 98 Ky. 673, 34 S.W. 18 (1896) (city ordinance requiring all transients other than citizens of the city to pay license tax whenever selling any goods within the municipality violated the Privileges and Immunities Clause); *In re Jarvis*, 66 Kan. 329, 71 Pac. 576 (1903) (Kansas statute requiring peddler to procure license but exempting peddlers working in the county where they reside is repugnant to the Privileges and Immunities Clause). *Cf. Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N.W.2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents held to be unconstitutional).

Fecheimer v. City of Louisville, 84 Ky. 306, 309, 2 S.W. 65, 66 (1886).

In an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951), that it is "immaterial" that the Madison ordinance subjected some intra-state concerns to the same discriminatory treatment as firms from out of state.[51] The critical element in finding impermissible discrimination in *Dean Milk* and the case at bar is that in both instances all out-of-state residents are subject to discrimination by being denied access to a local market, and selected local residents are beneficiaries of this discrimination, based solely on their state of residence. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden that some New Jersey residents are similarly burdened.

Permitting Camden to penalize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution was designed to eliminate. *Austin v. State of New Hampshire, supra*, 420 U.S. at 667. Rather than encouraging economic welfare, the Camden resident hiring quota will merely foster internecine economic warfare, resulting in the kind of balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal. When a classification utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privilege and Immunities Clause, and it is not exempt from constitutional review

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51. *Cf. Brimmer v. Rebman*, 138 U.S. 78, 82-3 (1891); *Minnesota v. Barber*, 136 U.S. 313, 326 (1890) ("A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.") (citations omitted)

merely because some in-state residents are also disadvantaged.

D. The Camden Ordinance Is Invalid Because There Is No Proof That Nonresidents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed and That the Discrimination Practiced Bears a Substantial Relationship to the Particular "Evil" That the Nonresidents Are Said to Present.

Because access to private employment opportunities is safeguarded by the Privileges and Immunities Clause and the Camden ordinance is subject to scrutiny by excluding all out-of-state residents from such access, then the only issue remaining is whether the ordinance meets the Privileges and Immunities Clause test adopted by this Court. Under established principles, it does not pass constitutional muster.

It is beyond dispute that the Privileges and Immunities Clause is not absolute and certainly "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell, supra,* 334 U.S. at 396. Rather, it bars discrimination against citizens of other states only "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* Under the two-pronged test established in *Toomer v. Witsell, supra,* a "substantial reason for the discrimination" would not exist ". . . unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Id.* 398, and there is a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.* 399.[52]

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52. As one commentator has concluded regarding *Toomer*:

The State's interests in conserving shrimp and paying the costs of doing so were insufficient because the state failed to establish 1) a sufficiently *unique* link between the interests served and the discrimination practiced; 2) a sufficiently *dem-*

Following the standards established in *Toomer*, this Court recently held in *Hicklin v. Orbeck*, 437 U.S. 518 (1978) that a resident preference requirement imposed by state law on private contractors engaged in construction work related to Alaska's oil and gas leases which was designed to alleviate high unemployment violated the Privileges and Immunities Clause. This Court observed that even if "a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents" — a proposition itself considered "dubious", *Id.* 526, the Alaska Hire law was still constitutionally invalid. The Court stressed that there was no showing that nonresidents were "a peculiar source of the evil" of high unemployment that the statute was enacted to remedy:

> What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents . . . were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities . . .

Id. 526-27. Moreover, the Court reasoned that even if the State had demonstrated that nonresidents were a "peculiar source of the evil," the statute still violated the second prong of the *Toomer* test, because the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent:

NOTE — (Continued)

onstrated link between the legitimate interests served and the discrimination practiced; and 3) the actual impracticality of apparent and less *restrictive alternatives*. . . (footnotes omitted, emphasis in original).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-33 at 409-410 (1977).

> Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job training program . . . Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Id. 527-28.[53]

The analogy to the case at bar is compelling. The Camden ordinance was purportedly enacted to reduce unemployment. But the fact that the objective may be

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53. Following this rationale, courts in New Jersey in *Neshaminy Constructors, Inc. v. Krause, supra*, New York in *Salla v. County of Monroe, supra*, Massachusetts in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra*, and Washington in *Laborers Local Union No. 374 v. Felton Construction Company, supra*, have struck down state statutes which granted an absolute job preference to state residents on all public works construction projects. Like the State of Alaska in *Hicklin*, the State of New York sought to justify its resident preference as necessary to relieve unemployment. In finding this purpose insufficient, the New York Court of Appeals emphasized:

> Granted that the counteracting of unemployment is a legitimate State concern, the relevant criteria for privileges and immunities analysis still are whether non-residents are a 'peculiar source' of the evil of joblessness in New York and whether the statute is fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who do not contribute to it. In the end, nothing less than a unique link between the interest served and the discrimination practiced will do. *Salla v. County of Monroe, supra*, 48 N.Y.2d at 523, 399 N.E. 2d at 913-14, 423 N.Y.S.2d at 882.

legitimate does not authorize Camden to employ constitutionally impermissible means to achieve that objective:

> But in any event, appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which . . . is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

Toomer v. Witsell, supra, 334 U.S. at 397-98. Moreover, this Court has never held that a state may, consistent with the Privileges and Immunities Clause, attempt to alleviate unemployment problems by requiring private employers to exclude nonresidents.[54]

Secondly, Camden has offered no evidence whatsoever that nonresidents "constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Toomer v. Witsell, supra*, 334 U.S. at 398. The City has

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54. Nor can it be realistically argued that the affected employees are public employees. Camden does not hire them, fire them, pay them, set terms and conditions of their employment or negotiate with them or their representatives about their employment. In the case of employees of subcontractors and those referred by union hiring halls, Camden has absolutely no relation with the subcontractor or hiring hall other than that the city is the site of the job. *Cf. White v. Massachusetts Council of Construction Employers, supra*, 103 S. Ct. at 1052-53 (Blackmun, J., concurring in part and dissenting in part). That the project is financed in part by public money does not convert a private person into a municipal employee. *See, e.g., Rendell-Baker v. Kohn*, ____ U.S. ____, 102 S. Ct. 2764, 2771 (1982). ("The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts").

not demonstrated that the influx into Camden of nonresidents seeking employment either caused or substantially exacerbated the City's unemployment dilemma. Moreover, the ordinance, in barring nonresidents from competing for construction jobs in Camden, will simply result in exporting the problem of unemployment — a solution heretofore not permitted by the Federal Constitution. *Edwards v. California*, 314 U.S. 160 (1941).

Ironically, the New Jersey Legislature has specifically mandated in the Local Public Contracts Law that a municipality may *not* "[r]equire that any bidder be a resident of, or that his place of business be located in the county or municipality in which the purchase will be made or the contract or agreement performed . . ." N.J.S.A. 40A:11-13. Thus, Camden is precluded from requiring that the general contractor with whom it has direct dealings be a municipal resident but is seeking to regulate relationships among wholly private parties, *i.e.*, subcontractors and their employees and union hiring halls, entities with which the City has no relationship whatsoever.

Even if the City demonstrates that nonresidents are "a peculiar source of evil," the discrimination must bear "a substantial relationship to the particular evil . . . [nonresidents] are said to present" for the ordinance to survive constitutional scrutiny. *Hicklin v. Orbeck*, *supra*, 437 U.S. at 527. In the case at bar, the ordinance is certainly not "closely tailored" to the legitimate ends sought to be achieved. The ordinance does not draw its preference in terms of "unemployed residents," but instead only in terms of Camden residents, offering an across-the-board blanket preference to all long term City resident-employed or unemployed, rich or poor. Thus, Camden can offer no substantial reason for the onerous burden placed on out-of-state residents "beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, *supra*, 334 U.S. at 396.[55]

55. Nor can *Hicklin* be distinguished on the ground that the prohibition at issue in that case applied not only to those directly holding state-issued oil and gas leases, but also to subcontractors

Unemployment is a blight on the national landscape which knows no political or geographic boundary.[56] Whether it ever might be constitutional for a municipal-

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NOTE — (*Continued*)
and suppliers who had no direct dealings with the State. 437 U.S. at 531. Yet, the same is true in the case *sub judice*; the Camden ordinance applies not only to general contractors in privity with the city, but also to subcontractors and union hiring halls, although "none of these . . . have direct dealing with the [City] . . ." *Id.* 530. Moreover, the Camden ordinance by its very terms applies to public works construction, residential housing and any transaction in which the city might confer a financial benefit, excluding a tax abatement. Certainly, it cannot be said that the terms of the ordinance are narrowly drawn. Finally, that portion of the *Hicklin* opinion describing the breadth of Alaska Hire was in response to the State's argument [(based on *McCready v. Virginia*, 94 U.S. 391 (1877)] "that because the oil and gas that are the subject of Alaska Hire is *owned* by the state, this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and leaves the act totally without the scope of the Privileges and Immunities Clause." *Id.* 528 (footnote omitted, emphasis in original). Such an argument is inapposite here, because construction jobs are not a resource as that term has been used in *McCready*, *supra*, and its progeny. In addition, as the lower court indicated in *Hicklin v. Orbeck*, 565 P.2d 159, 161 n.1 (Alaska 1977), Alaska Hire as of June 1976 would apply to approximately six per cent of the total employment in the state.

56. Thus, while the stated purpose of the Camden resident preference ordinance was to reduce unemployment, according to the United States Bureau of Labor Statistics, unemployment in the City of Philadelphia in 1981 was 12.5 per cent, black unemployment 21.2 per cent and black male unemployment 22.7 per cent. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, GEOGRAPHICAL PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1981 BULLETIN 2156 at 97, and 103 (December 1982). The problem of unemployment is continuing to increase. In April, 1983, while the national unemployment rate fell to 10.2 per cent and in New Jersey the rate fell to 7.4 per cent, in Pennsylvania, the unemployment rate was 13.2 per cent, the second highest of the ten largest states. *The Philadelphia Inquirer*, 1 (May 7, 1983). Unemployment among males in Pennsylvania during the first quarter of 1983 was 17.5 per cent. *The Philadelphia Inquirer*, 1-D (May 15, 1983). The Department of Labor's 1982 statistics show a rise of the unemployment rate for Philadelphia to 13.9 per cent and the rate for blacks was 21.0 per cent. U.S. Department of Labor, Bureau of Labor Statistics, unpublished statistics.

ity to attempt to ease its unemployment problems by requiring private employers to exclude all nonresidents from access to a significant segment of employment opportunities "a policy which may present serious constitutional questions," *Hicklin v. Orbeck, supra,* 437 U.S. at 528, *Hicklin* clearly stands for the proposition

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According to the Department of Labor, during 1981 Philadelphia lost 6,000 jobs. This was the eleventh decrease in the past twelve years. Since 1974, Philadelphia has lost 70,000 jobs. In the construction industry, the number of available jobs in Philadelphia decreased by 3.4 per cent during 1981. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, PHILADELPHIA EMPLOYMENT TRENDS, 1981, REGIONAL REPORT 56 (1982). Unemployment in the construction industry was 20.6 per cent in 1981. U.S. DEPARTMENT OF LABOR, GEOGRAPHICAL PROFILE. Nationally, in October, 1981, construction workers had an unemployment rate of 18 per cent, a rate higher than that of any other occupation in the nation. Note, *Construction Worker Residency Requirements: A Constitutional Response,* 17 NEW ENG. L. REV. 461 n.2 (1982). The problem of black youth unemployment in Philadelphia is even more distressing. Department of Labor statistics show that among certain age groups the unemployment rate is as high as 32.2 per cent. U.S. Department of Labor, Bureau of Labor Statistics, unpublished statistics. According to a recent report of the Urban League of Philadelphia:

> [n]owhere in the United States — with the possible exception of Detroit — has the problem of minority youth unemployment reached the crisis proportions that it has in Philadelphia . . . In Philadelphia, the [official] unemployment rate [minority] 16 to 19 years old was 32.1 percent — a rate topped only by Detroit where 39.8 per cent of those in that age group were unemployed. The national teenage unemployment rate is just under 18 percent . . . According to the National Urban League's calculations, the black unemployment in an area is generally about twice that of the official rate for the population as a whole. Called the Hidden Unemployment Index, this formula counts discouraged workers no longer looking for work as well as those working part-time who are actually seeking full-time jobs. Under this index, the black youth unemployment rate in Philadelphia was probably more than 60 percent in 1980 and is still rising.

Johnson, The Dilemma of Youth Unemployment, in THE STATE OF BLACK PHILADELPHIA 1982, 73, 75 (Urban League of Philadelphia, 1982).

that it cannot do so through an "across-the-board grant of job preference to all its residents." *Id.* That is precisely what Camden has sought to do here. To uphold the constitutionality of the Camden resident preference ordinance would compromise significantly the underlying vision of the Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

E. Even If This Court Finds That Camden Is Acting as a Market Participant, Camden's Exclusion of Out-of-State Residents from Access to Employment Opportunities Is Not Immunized from Scrutiny under the Privileges and Immunities Clause.

Recently, this Court held in *White v. Massachusetts Council of Construction Employers*, ____ U.S. ____, 103 S. Ct. 1042 (1983) that an executive order of the Mayor of Boston requiring at least half of the work force on city funded public construction projects to be bona fide city residents did not violate the Commerce Clause because the City was acting merely as a market participant. Relying upon *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court stressed that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White, supra*, 103 S. Ct. at 1044. The fact that a city's ordinance may burden interstate commerce is irrelevant, for if the "city is a market participant then the Commerce Clause establishes no barrier" to placing conditions on private employment. *Id.* 1046. However, the *White* ruling is not dispositive of the Privileges and Immunities issue presented in this case.[57] To so hold is to

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57. Indeed, the Court specifically refused to rule on the Privileges and Immunities challenge to the Boston executive order. *Id.* 1048 n.12.

overlook the vital differences between the reach and purposes of the Privileges and Immunities Clause and those of the Commerce Clause.[58]

Unlike the Commerce Clause, which applies an implied restraint on state action,[59] the Privileges and Immunities Clause imposes a direct limitation on governmental action. As a charter of personal rights,[60] the Clause is not concerned with the method employed to effectuate the exclusion, but with the discriminatory conduct itself. The Clause constitutes an express denial of the right of any state to make residency alone the basis for any act of discrimination. Thus, the distinction between market participation and market regulation is irrelevant to Privileges and Immunities Clause analysis. Rather, the Clause by its very terms must apply to *all* governmental action, regardless of the characterization of the government's role in the marketplace.[61]

Moreover, unlike the Commerce Clause, which re-

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58. Conduct permissible under the Commerce Clause is not necessarily lawful under other sections of the Constitution. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976); *City of Rome v. United States*, 446 U.S. 156, 178-79 (1980) (and cases cited therein.)

59. *See* Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L. J. 425 (1982).

60. The fact that corporations are not "citizens" within the protection of the Privileges and Immunities Clause, *Paul v. Virginia*, *supra*, indicates the Clause's importance as a safeguard of individual liberty.

61. As one commentator has emphasized:

> Discrimination is necessarily a central issue, however, in privileges and immunities litigation under Article IV . . . The commerce clause, of course, could have served as a unifying and centralizing force of a comparable sort-and indeed has served something like that function . . . But it would have been more difficult for the commerce clause [as opposed to the privileges and immunities clause] to serve as a charter of personal rights secure against *all* governmental action. (citations omitted, emphasis in original).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra*, §6-5 at 327 n.7 and §6-32 at 405 n.4.

quires a showing of a burden on interstate commerce, Privileges and Immunities Clause protection is triggered even when there is no indication of interference with interstate commerce. The Clause protects the right of out-of-state residents to participate in the common market on an equal footing with all in-state residents, regardless of whether the activity involves interstate or intrastate business. The purpose of the Clause is to outlaw classifications based on non-citizenship unless nonresidents are "a peculiar source of evil" and unless the discrimination bears "a substantial relationship to the particular 'evil' they are said to present." *Hicklin v. Orbeck, supra,* 437 U.S. at 527. Any enactment, including the Camden resident preference ordinance, which is passed for no reason other than to exclude nonresidents, must be subject to heightened scrutiny. *Austin v. State of New Hampshire, supra,* 420 U.S. at 663.

There is perhaps no economic right as important to the citizens of this land than the right to travel throughout the country and ply their trade without exclusion and discrimination. To the out-of-state resident denied an opportunity for access to work in the private sector based solely on state of residency, the barriers erected by the Camden ordinance are no less severe or imposing whether a result of the city acting as a market regulator or participant. Immunizing Camden's parochial practices because of its alleged market participation would ignore the underlying vision and promise of the Privileges and Immunities Clause.

II. THE CAMDEN ORDINANCE'S ONE YEAR DURATIONAL RESIDENCY REQUIREMENT FOR PREFERENCE FOR AT LEAST FORTY PER CENT OF THE JOBS WITH PRIVATE CONTRACTORS ON PUBLIC WORKS CONSTRUCTION PROJECTS VIOLATES THE EQUAL PROTECTION CLAUSE, BECAUSE THE REQUIREMENT PENALIZES THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL.

A. The Durational Residency Requirement Imposed By the Camden Ordinance Penalizes the Fundamental Right of Interstate Travel.

Even if this Court finds that the lower court did not err in holding that the Camden resident hiring quota was constitutional under the Privileges and Immunities Clause of Article IV, §2, the City's ordinance, by imposing a durational residency requirement, impinges on the fundamental constitutional right of interstate travel and violates the Equal Protection Clause of the Fourteenth Amendment, unless justified by a compelling state interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). In upholding the ordinance, the New Jersey Supreme Court completely ignored the distinction that has been drawn in "right to travel" cases between continuing and durational residency requirements and failed to recognize that the Camden ordinance impermissibly denies access to private employment opportunities based on length of residency.

For more than a century, this Court has emphasized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to protect a person's right to travel, migrate, resettle, find a new job and start a new life without suffering legal disabilities. *See, e.g., Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868); *Edwards v. California*, 314 U.S. 160 (1941);

Dunn v. Blumstein, *supra*, 405 U.S. at 338-39; *Memorial Hospital v. Maricopa*, *supra*, 415 U.S. at 254-55.[62]

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.

Shapiro v. Thompson, *supra*, 394 U.S. at 629. As stressed by Chief Justice Taney in the *Passenger Cases*:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as free as in our own States.

48 U.S. (7 How.) 283, 492 (1849).

The right of interstate travel has been repeatedly af-

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62. The right to travel is deeply rooted in Anglo-American Jurisprudence. *See* 1 W. BLACKSTONE, COMMENTARIES 134 (the right of "removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due cause of law" is integral to the concept of liberty). The right to travel can be found in the Magna Carta, which guaranteed free passage into and out of the realm, MAGNA CARTA, Ch. 42 (1215), cited in Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, n.3. The Articles of Confederation provided that ". . . to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall have free ingress and regress to and from any other state . . . ARTICLES OF CONFEDERATION art IV, para. 1 (1781). The Framers of the Constitution made no explicit mention of the right to travel in the Constitution itself, presumably because the concept of free movement was so basic to the very idea of a federal union that outright mention would have been redundant. Z. CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 at 184-187 (1st ed. 1956).

firmed as a basic constitutional right. *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 255.[63] Although the textual source of this right has been the subject of debate,[64] its fundamental nature is now beyond dispute. *Jones v. Helms*, 452 U.S. 412, 418 (1981). In *United States v. Guest*, 383 U.S. 745 (1966), the Court explained that:

> . . . [t]he Constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution . . . (citations omitted).

Id. 757-58.

Over the past fifteen years, this Court has consistently invalidated durational residency requirements which have been found to impermissibly burden and penalize the fundamental right to interstate travel. *See*,

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63. Indeed, this Court recently observed that "[t]he constitutional right of interstate travel is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (*per curiam*).

64. Supreme Court decisions have located the source of the right to travel in various constitutional provisions, including the Privileges and Immunities Clause of Article IV §2, *Ward v. Maryland*, *supra*, 79 U.S. (12 Wall) at 430; the Commerce Clause, *Edwards v. California*, *supra*, 314 U.S. at 177; the Privileges and Immunities Clause of the Fourteenth Amendment, *Id.* at 178 (Douglas, J., concurring); *Id.* at 181-83 (Jackson, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); and the due process clauses of the fifth and fourteenth amendments, *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Shapiro v. Thompson*, *supra*, 394 U.S. at 671 (Harlan, J., dissenting).

e.g., *Shapiro v. Thompson*, *supra* (one year waiting period for welfare benefits); *Dunn v. Blumstein*, *supra* (one year state and three month county residency requirements for voting); *Memorial Hospital v. Maricopa County*, *supra* (one year residency requirement for county funded nonemergency medical care). In striking down such classifications, this Court has stressed that they "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn v. Blumstein*, *supra*, 405 U.S. at 342.[65] Durational residency requirements create two classes of needy resident families, indistinguishable from each other except by length of residence. *Shapiro v. Thompson*, *supra*, 394 U.S. at 627. By denying basic necessities of life, such as welfare and medical care, durational residency classifications operate " 'to *penalize* those persons . . . who have exercised their constitutional right of interstate migration' [and] must be justified by a compelling state interest."[66]

Nor has the Court found it necessary to show that the durational residency requirement actually deterred residents from moving:

> *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. (footnote omitted)

Dunn v. Blumstein, *supra*, 405 U.S. at 339-40. Rather,

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65. As this Court recently stressed: "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents." *Zobel v. Williams*, *supra*, 102 S.Ct. at 2312 n.6.

66. *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 258 (citations omitted, emphasis in original.)

> Not unlike the admonition of the Bible that 'Ye shall have one manner of law, as well for the stranger, as for one of your own country,' Leviticus 24:22 (King James Version) the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.

Memorial Hospital v. Maricopa County, *supra*, 415 U.S. at 262. Durational residency requirements penalizing the right to migrate are violative of the Equal Protection Clause " 'unless shown to be necessary to promote a *compelling* governmental interest' " *Id.* (citation omitted, emphasis in original).

Similarly, lower courts relying on this Court's rationale in *Shapiro* and its progeny have struck down durational residency requirements which have been imposed as qualifications for vital services and economic benefits such as welfare,[67] medical care,[68] public housing[69] and veterans' benefits.[70]

The City of Camden, by restricting access to private employment opportunities on public works construction

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67. *See, e.g., Butler v. Breyer*, 355 F. Supp. 405 (S.D. Ohio 1972) (three-judge court) (State relief for the poor); *Baxter v. Birkins*, 311 F. Supp. 222 (D. Colo. 1970) (three-judge court) (ADC benefits); *Sheard v. Department of Social Welfare*, 310 F. Supp. 544 (N.D. Iowa 1969) (three-judge court) (State old age assistance). Statutes have been invalidated when the municipal durational residency requirement was allegedly adopted as a health measure to alleviate an acute housing shortage, *Demiragh v. DeVas*, 476 F.2d 403 (2d Cir. 1973) (when housing vacancy rate falls below 2 per cent, city welfare payments limited to residents who have resided for longer than a year); and when the requirement was purportedly adopted to improve depressed economic conditions of a state, *Besaw v. Affleck*, 333 F. Supp. 775 (D.R.I. 1971) (three-judge court); *Rivera v. Dunn*, 329 F. Supp. 554 (D. Conn. 1971) (three-judge court), *aff'd mem.*, 404 U.S. 1054 (1972); *Cf. Pease v. Hansen*, 404 U.S. 70 *rev. mem.*, 157 Mont. 99, 483 P.2d 720 (1971) ("Whether or not a welfare program is or is not federally funded is irrelevant to the

Notes continued on next page

to residents who have lived within the City for at least a year, is discriminating between new and long term residents, indistinguishable in every respect, except that the former individuals are denied access to employment opportunities merely because they have exercised their constitutional right to travel. Thus, Camden is forcing a person who wishes to travel and change residence to choose between travel and access to employment opportunities. *See Dunn v. Blumstein, supra*, 405 U.S. at 342.

This Court has repeatedly recognized that access to the common occupations of life is of the very essence of personal freedom and opportunity which the Fourteenth Amendment was adopted to secure. In *Smith v. Texas*, 233 U.S. 630, 641 (1914), by invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, thereby excluding numerous equally quali-

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NOTE — (Continued)
constitutional principles enunicated in *Shapiro v. Thompson* . . .") (citations omitted).

68. *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971) (three-judge court) (one year county residency prior to receipt of free medical care); *Crapps v. Duval County Hospital Authority*, 314 F. Supp. 181 (M.D. Fla. 1970) (one year county residency prior to receipt of free medical care); *Vaughan v. Bower*, 313 F. Supp. 37 (D. Ariz.) (three-judge court), *aff'd mem.*, 400 U.S., 884 (1970) (one year durational residency requirement for commitment to state mental hospital).

69. *See, e.g., Cole v. Housing Authority*, 435 F.2d 807 (1st Cir. 1970) (two year waiting period for subsidized public housing); *King v. New Rochelle Municipal Housing Authority of City of Newport*, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971) (five year residency requirement for admission to public housing).

70. *See, e.g., Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1979) (three year residency requirement for receipt of certain veterans' welfare benefits). For a summary and analysis of many of the cases on durational residency requirements *see* Note, *Durational Residency Requirements From Shapiro Through Sosna: The Right To Travel Takes A New Turn*, 50 N.Y.U.L. REV. 622 (1975).

fied employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." The Court went on to stress:

> In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawfull calling.

Id. 636. The following year in *Truax v. Raich*, 239 U.S. 33 (1915), in which the Court struck down an Arizona statute which limited any business employing more than five workers from hiring more than twenty per cent resident aliens, Justice Hughes in delivering the opinion for the Court stated emphatically:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. (citations omitted)

Id. 41.

Recently, in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976), this Court struck down a civil service regulation banning aliens from federal employment, basing its ruling in part upon the importance of access to employment opportunities: "The added disadvantage resulting from the enforcement of the rule — ineligibility for employment in a major section of the economy — is of sufficient significance to be characterized as a depri-

vation of an interest in liberty."[71] *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 322-23 (Marshall, J., dissenting); *Keenan v. Board of Law Examiners of North Carolina*, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970) ("The right to work for a living in one's chosen occupation is for most people a prerequisite to the pursuit of happiness. If a man may be arbitrarily made to give up his life time endeavor — even for a year — in order to move his residence, it is idle to talk to him about Fourteenth Amendment protection of personal freedom"); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 579, 79 Cal. Rptr. 77, 86, 456 P.2d 645, 654 (1969) ("Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness . . .").

Although this Court has never considered the question of durational residency requirements for access to private employment opportunities, lower courts almost

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71. Although both *Truax* and *Mow Sun Wong* are alienage cases, and the Court has often applied strict scrutiny to legislation disfavoring this class, *see, e.g., Graham v. Richardson*, 403 U.S. 365 (1971), such a characterization does not minimize the importance of the historical significance of personal interests in employment. *Truax* was decided before the Court recognized a stricter level of review for suspect classifications. *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Mow Sun Wong* was decided on due process, not equal protection grounds; the existence of a significant liberty interest in public employment, not the suspect nature of the class, determined the outcome. 426 U.S. at 116-17. Moreover, in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), in which the Court invalidated a state statute that banned certain resident aliens from state financial assistance for higher education, Chief Justice Burger dissented on the grounds that the previous alienage cases involved the much more important interests of "engaging in certain occupations or professions" which thereby impaired "their ability to earn a livelihood" or the interest of obtaining welfare benefits. *Id.* 12-13.

universally have invalidated state[72] and local[73] durational residency laws which limit such access. These courts have struck down durational residency requirements which restricted government employment, private employment on public projects and work in connection with construction of oil and gas pipelines,[74] commercial fishing,[75] and veterans' preference in public employment.[76]

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72. *See, e.g., Nehring v. Ariyoshi*, 443 F.Supp. 228 (D. Hawaii 1977) (one year state residence requirement imposed on applicants for state and local government jobs); *Justice v. Manzagol*, 11 E.P.D. ¶10,758 (D.N.M. 1976) (one year residency for all state nonprofessional employees); *Costa v. Bluegrass Turf Service, Inc.*, 406 F.Supp.1003 (D. Ky. 1975) (statute requiring one year residency for employees of state-licensed liquor stores); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (personnel rules giving absolute hiring preference to one year Alaskan residents).

73. *Spradling v. Hutchinson*, 253 S.E. 2d 371 (W. Va. 1979) (requirement that applicant for police officer must have been resident of city where he is applying or of county in which city is situated for at least one year prior to his application); *Eggert v. City of Seattle*, 81 Wash. 2d 840, 505 P.2d 801 (1973) (city charter provision favored one year city or county residents for municipal employment); *Cooperrider v. Civil Service Commission of San Francisco*, 97 Cal. App. 3d. 495, 158 Cal. Rptr. 801 (Ct. App. 1979) (Civil Service Commission rule imposing one year durational residency requirement on applicants for municipal employment).

74. *People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975) (one year durational residence in state for preference for employment on public works projects); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977) (any residency requirement for employment on all construction in connection with oil and gas pipelines in excess of thirty days is unconstitutional; not appealed to the Supreme Court, 437 U.S. at 522).

75. *Hassan v. Town of East Hampton*, 500 F.Supp.1034 (E.D.N.Y. 1980) (one year of town residence required to obtain commercial shellfishing license); *Massey v. Apollonio*, 387 F.Supp. 373 (D.Maine 1974) (statute requiring presence within state for at least 8 months of each year for three successive years to receive lobster fishing license).

76. *Carter v. Gallagher*, 337 F.Supp. 626 (D. Minn.) *aff'd*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (five year residency requirement for veterans' preference); *Stevens v. Campbell*, 332 F.Supp. 102 (D.Mass. 1971) (five year consecutive residence in state for preference in employment in classified civil service).

The effect of the Camden resident preference is to deny new residents the essential means of economic survival.[77] Access to employment opportunities is as much a necessity of life[78] as the ability to obtain welfare

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77. Nor is it relevant that the durational residency requirement bars new residents from forty rather than one hundred per cent of the construction jobs. To the resident who is excluded for an impermissible reason, it is little consolation that the exclusion only applies to forty per cent of the jobs on each construction project. Moreover, if Camden is empowered to deny bona fide residents who have lived in the City less than a year access to forty per cent of such jobs, it appears equally empowered to deny new residents access to eighty per cent of all of the private jobs on public works construction. *See Truax v. Raich*, *supra*, 239 U.S. at 42-43; *Nyquist v. Mauclet*, *supra* 432 U.S. at 9; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). Indeed, the forty per cent resident preference in the Camden ordinance is only a minimum requirement (A56).

78. Nor does the fact that there is no fundamental constitutional right to public employment, *see, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) compel a contrary conclusion. There is no fundamental right to welfare, *Dandridge v. Williams*, 397 U.S. 471, 483 (1970), nor to non-emergency medical care, but strict scrutiny was still applied in *Shapiro v. Thompson*, *supra*, and *Memorial Hospital v. Maricopa County*, *supra*, because the residency requirement penalized the fundamental right of interstate travel. By merely stating that "[t]he right to employment on a local public works project" is not a fundamental right and applying a rational basis test (A28), the New Jersey Supreme Court ignored the precedent of this Court and overlooked the pervasive injury inflicted by the Camden ordinance.

79. Many of those cases which have applied strict scrutiny in striking down durational residency restrictions placed on employment have considered access to employment opportunities a basic necessity of life. In *Nehring v. Ariyoshi*, the district court explained that ". . . employment is the only way for people to provide themselves with the necessities of life." *Id.* 237. Similarly, in *Hassan v. Town of East Hampton*, *supra*, in striking down a residency requirement for obtaining a fishing license, the court concluded:

> . . . [T]he level of impact of the East Hampton ordinance challenged here is clearly sufficient to trigger the strict scrutiny standard of equal protection review because the ordinance burdens a critical aspect of plaintiff's existence, his right to pursue

in *Shapiro* and non-emergency medical care in *Maricopa*.[79] Indeed, it would be ludicrous for this Court to find that it is unconstitutional to impose a durational residency requirement on an individual seeking welfare, but it is permissible to impose the very same requirement on an individual seeking access to employment in order to escape welfare.[80]

Admittedly, bona fide residency requirements have been upheld for municipal employees.[81] However, in

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his livelihood; a right that is as much 'a basic necessity of life' as welfare assistance, non-emergency medical care and voting were found to be in earlier Supreme Court decisions. (citations omitted).

Id. 1041.

80. Curiously, the Attorney General of the State of New Jersey has taken two contradictory positions in litigation before this Court and in *Neshaminy Constructors, Inc. v. Krause, supra*, which is now pending before the New Jersey Supreme Court. *Neshaminy Constructors* involves a challenge to the constitutionality of N.J.S.A. 34:9-2, which requires that with respect to construction contracts awarded by the State or any other public body that "preference in employment thereon shall be given to citizens of the State of New Jersey who have *resided and maintained domiciles with the state for a period of not less than one year immediately prior to such employment*." (emphasis added). The State in its brief to the New Jersey Supreme Court, filed on January 13, 1983, unequivocally stated that the durational residency requirement is unconstitutional: "The State concedes, as it did before the trial court and the Appellate Division, that that portion of N.J.S.A. 34:9-2 which goes beyond a bona fide residence requirement and mandates that persons reside and maintain a domicile in New Jersey for at least a one year period prior to employment on public construction projects cannot survive scrutiny under the United States Supreme Court decisions invalidating such clauses as inconsistent with the Equal Protection principles applicable to laws distinguishing new residents from old." (citations omitted.) Brief and Appendix For Appellant — Intervenor, The State of New Jersey at 5. We note no difference between the durational residency requirement of the State statute and that of the Camden ordinance.

81. *See, e.g., McCarthy v. Philadelphia Civil Service Comm'n, supra*, (fire department employee); *Wright v. City of Jackson, Mississippi*, 506 F.2d 900 (5th Cir. 1975) (fire department employees);

each of these cases, the courts have consistently distinguished between continuing residency requirements at the time of employment, which are permissible, and durational residency requirements prior to employment, which the courts have indicated are invalid.[82] Thus, in *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976) a *per curiam* opinion upholding a continuing residency requirement for municipal employees, this Court stressed:

> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus, in *Shapiro* . . . we stated: 'The residence requirement and the one-year waiting period requirement are distinct and independent prerequisites,' And in *Memorial Hospital* . . . quoting *Dunn* . . . the Court explained that *Shapiro* and *Dunn* did not question 'the validity of appropriately defined and uniformly applied bona fide residence requirements.' (citations omitted)

Id. 647. Here, by its very terms, Camden is penalizing all individuals who have recently exercised their right to travel, by unlawfully preconditioning access to employment opportunities upon length of municipal

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NOTE — (*Continued*)

Wardwell v. Board of Education of City School District, 529 F.2d 625 (6th Cir. 1976) (school teacher); *Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (municipal employee); *Detroit Police Officers Association v. City of Detroit*, 385 Mich. 519, 190 N.W.2d 97 (1971), *app. dismissed*, 405 U.S. 950 (1972) (police officer).

82. *Wright v. City of Jackson, supra*, 506 F.2d at 902; *Wardwell v. Board of Education, supra*, 529 F.2d at 627-28; *Andre v. Board of Trustees of Village of Maywood, supra*, 561 F.2d at 52-3; *Mogler v. Sevier County School District*, 540 F.2d 478, 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

.residency.[83] In upholding the Camden resident hiring quota, the New Jersey Supreme Court completely ignored the vital distinction that this Court and lower courts have drawn between continuing and durational residency requirements.

The right of interstate travel is basic to our constitutional scheme of values.[84] It would be a hollow right and empty promise if cities such as Camden were able to pe-

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83. Indeed, the City of Camden is imposing far more onerous residency restrictions on private employment in relation to public works construction than it imposes on its own employees. Thus, the City is precluded from requiring teachers (N.J.S.A. 18A:26-1.1), police (N.J.S.A. 40A:14-122.1) or fire department employees (N.J.S.A. 40A: 14-9.1) to be municipal residents. Although Camden by ordinance adopted July 23, 1981 (Ordinance MC 1760) requires other officers and employees to be city residents, that ordinance does not impose any *durational* residency requirement. The ordinance also provides for a broad exemption for professional employees who are not required to live in the City. Moreover, there is no durational residency requirement imposed on the Affirmative Action Review Council, which is the body designed to facilitate implementation of the Camden resident hiring ordinance at issue in the case *sub judice* (A39-A40; A53). Thus, while private employees seeking access to public works construction jobs are required to be municipal residents for a year or longer, no such requirement is imposed on the City attorney defending the ordinance, the affirmative action council implementing the ordinance, or any other municipal employee.

84. Americans continue to be a highly mobile people and durational residency restrictions like the Camden ordinance, if upheld, may have a potentially devastating impact. According to the United States Census Bureau, between 1975 and 1980, over 91 million Americans, or 45.1 per cent of the population over age five, moved at least once. Approximately eighteen and one half million of those moved to a different state and 53.1 per cent of those moving were unemployed. Almost seven and a half million of the people who moved were employed in crafts or were laborers. U.S. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, No. 368, *Geographical Mobility: March 1975 to March 1980* (1982).

nalize individuals by denying them access to private employment opportunities every time they chose to exercise that right.

B. The Camden Ordinance's Durational Residency Requirement Is Not Necessary to Promote a Compelling State Interest.

Because the Camden ordinance's durational residency requirement penalizes the fundamental right of interstate travel by limiting access to private employment opportunities, it is subject to strict scrutiny. Under this standard, the classification created by the residency requirement is unconstitutional unless it is necessary to promote a compelling state interest. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974), *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Camden's purported interest in enacting its long term resident hiring quota is to alleviate unemployment. Although such a goal may be laudable, Camden has chosen impermissible means to achieve its objectives. At the outset, it is important to note that the City has less authority to achieve its goals by imposing residency requirements on private employees, who are neither hired nor controlled by the City, than it does on public employees. The Minnesota Supreme Court clearly articulated this distinction in *Berg v. City of Minneapolis*, 274 Minn. 277, 143 N.W. 2d 200 (1966) in which that court, in upholding a continuing residency requirement for police officers, distinguished *Construction and General Labor Union Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N.W. 2d 26 (1965), (which had struck down a St. Paul ordinance compelling contractors who performed work for the City to employ only county residents) by stating:

> It did not involve government employment but dealt with the subject of people engaged in construction and general labor for contractors doing work on a city project. Such work does not involve public ser-

> vice of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life. It does not disturb the well-established rule that public employment is not a right but a privilege, and the legislature may give the municipality the authority to impose reasonable restrictions upon the activities of employees of the municipality as a part of their terms of employment . . . (citations omitted).[85]

Thus, none of the justifications which could support residency requirements when a city acts as employer and which were relied upon by the New Jersey Supreme Court to uphold the Camden durational residency requirement[86] are relevant when a city seeks to use its financial resources to control hiring in the private market.

Moreover, Camden cannot reduce unemployment by denying newcomers access to private jobs on public works construction. Just as *Maricopa* held that the County could not fence out new residents in favor of long term residents, 415 U.S. at 266, and *Shapiro* held that the State could not deny welfare benefits to new residents, even if doing so increased benefits to older residents,[87] Camen cannot bar newcomers from access

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85. *Berg*, 274 Minn. at 281, 143 N.W. 2d at 203.

86. A27-A28.

87. As this Court explained in *Shapiro v. Thompson*, *supra*, 394 U.S. at 631-632:

> More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving . . . than a mother who moves into a particular State in order to take advantage of its better educational facilities.

to forty per cent of the jobs in order to favor residents of one year or more.[88] Unemployed newcomers are just as deserving to share in the community's benefits[89] and just as needy as longer term residents. The city's duty to reduce unemployment is as much a duty to the newcomer as it is to the citizen of many years. *Cf. C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York*, 412 F. Supp. 1164, 1170 (E.D.N.Y. 1976), *aff'd mem. sub. nom., Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) (Equal Protection Clause violated by state statute requiring that employment preference on public works construction projects be given to New York citizens over resident aliens).

Moreover, even assuming *arguendo* that the means chosen to eliminate unemployment are permissible, those means are invalid unless they are precisely tailored to accomplish the stated governmental objectives:

> It is not sufficient for the State to show that durational residence requirements further a very

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88. Following this Court's reasoning in *Shapiro* and *Maricopa*, lower courts have uniformly rejected the reasoning that unemployment can be reduced at the expense of excluding new residents from access to employment. As stated in *Justice v. Manzagol*, 11 E.P.D. ¶10, 758 (D.N.M. 1976):

> The one year durational residence requirement, however, helps the unemployment situation only by fencing out the competition from other States. Certainly the State is providing more opportunity for its residents to find employment by limiting the competition for jobs. On the other hand, the aforementioned 'fencing' is just as certain an impermissible restraint on one's right to interstate travel.

Similar sentiments are expressed in *State v. Wylie*, 516 P.2d 142, 149 (Alaska 1973).

89. In striking down numerous employment restrictions that have been placed on aliens, this Court has repeatedly rejected justifications that employment is a scarce resource that needs to be reserved for citizens or that employment should be reserved for those who have made a greater contribution to the community. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 641-45 (1973) (state civil service); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605-06 (1976) (civil engineers.)

> substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be tailored to serve their legitimate objectives . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose, 'less drastic means' . . . (citations omitted).

Dunn v. Blumstein, supra, 405 U.S. at 343.

The classification employed by the Camden ordinance is not even remotely tailored to further the City's purported interest in reducing unemployment. Rather than targeting the employment preference to the long term unemployed, the ordinance merely benefits long term residents, regardless of their employment status. In addition, rather than increasing the number of jobs, the ordinance simply limits the universe of those who may compete for them. Certainly, there are far less restrictive and less onerous means available to the City to reduce its unemployment problem than seeking to solve it at the expense of newcomers to the City.[90]

Moreover, nothing in *Sosna v. Iowa,* 419 U.S. 393 (1975) compels a contrary result. In that case, the Court specifically reaffirmed its holdings in *Shapiro, Dunn* and *Maricopa,* 419 U.S. at 406, but upheld a one year waiting period before new residents could file for divorce.

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90. Instituting job training programs, for example, would be a less drastic method of accomplishing the city's professed goal of reducing unemployment. While aiding the unskilled long term unemployed, job training programs would not impose any burden on the right of interstate travel. Such programs could reduce unemployment in Camden without fencing out new residents from available job opportunities. *See State v. Wylie,* 516 P.2d 142, 149 (Alaska 1973).

The Court stressed that such a residency requirement did not severely penalize the right to interstate travel because the appellant was not "irretrievably foreclosed from obtaining some part of what she sought," *Id.* 406, an immediate divorce was not vital to a new resident and because of the state's traditionally paramount interest in regulating domestic relations. *Id.* 406-409.[91]

Here, by contrast, the denial of employment opportunities effected by the Camden ordinance irretrievably deprives all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood.[92] Furthermore, the problem of unemployment is of national scope, and the City's interest in regulating employment in the private market is not comparable to a state's paramount and longstanding historical interest in regulating domestic relations.[93] Thus, Mr. Justice Stevens commented recently in *Clements v. Fashing*, ___ U.S. ___, 102 S. Ct. 2836, 2849 n.2 (1982) (concurring opinion): "The Federal Constitution does, of course, impose significant constraints on a state government's employment practices," and this Court has consistently recognized that the federal interest in protecting rights under the Fourteenth

91. "The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States." *Id.* 404.

92. *See Hassan v. Town of East Hampton*, 502 F. Supp. 1034, 1041 (E.D.N.Y. 1980) ("Unlike the Iowa statute considered and upheld in *Sosna* which allows a patient Iowa petitioner to ultimately obtain the desired Iowa divorce adjudication, a similarly patient East Hampton shellfisherman cannot live in the town for one year and then regain the lost opportunity to pursue his livelihood for the statutory waiting period.")

93. Thus, in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859), this Court said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . ." Similarly, in *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), the Court recognized: "The State . . . has absolute right to prescribe the condition upon which the marriage relation between its own citizens shall be created and the causes for which it may be dissolved."

Amendment, at stake here, far outweighs a state's interest in regulating employment.[94]

Finally, *Sosna* stressed that the waiting period achieved Iowa's goals of protecting the person and property of the defendant spouse, avoiding intermeddling by the foreign state in marriages in which other states have overriding interests and insuring full faith and credit for the foreign state's divorce decrees. *Id.* 407-409. In contrast, the Camden resident preference is not reasonably tailored to effectuate the ordinance's purposes.[95]

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94. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-455 (1976). Under the Commerce Clause, the state's sovereignty in the area of employment may be greater. *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976). But in a recent case decided under the Commerce Clause, *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. ___ 103 S. Ct. 1054, (1983), this Court refused to defer to the state's interest in regulating employment, holding that the federal interest in preventing age discrimination outweighs the state's interest in prescribing a mandatory retirement age for its employees.

95. Alternatively, the Camden resident preference ordinance is violative of the Equal Protection Clause because it constitutes a deprivation of state citizenship. The citizenship clause of the Fourteenth Amendment forbids a state from denying state citizenship to a citizen of the United States residing within its borders. Although the grant of state citizenship does not carry with it any specific affirmative entitlements, classifying bona fide residents solely on the basis of when they attained their citizenship is offensive to the underlying vision of the Fourteenth Amendment:

> The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment does not suggest by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of the State . . . [T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions.

Zobel v. Williams, 102 S. Ct. at 2317-2318 (Brennan, J., concurring).

Once someone becomes a member of a political community, he or she should be treated like all other members of that community, with equal rights and responsibilities. However, Camden, by conditioning access to private employment to residents of a year or

Regardless of the test adopted, the Camden resident preference must fail. By excluding new residents from access to private sector employment opportunities and granting an absolute preference to long term city residents regardless of their employment status when far less restrictive alternatives are available, the City has selected a purported cure which is not even remotely suited to relieve the malady. Reducing unemployment may constitute a valid municipal interest, but it may not be achieved by means which are repugnant to fundamental constitutional rights.

CONCLUSION

For the foregoing reasons, we respectfully urge that the judgment of the New Jersey Supreme Court be reversed and the Camden resident hiring quota be declared unconstitutional.

STEVEN K. KUDATZKY
JAMES KATZ
HILARY B. KLEIN
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

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longer, is implicitly stating that some citizens are less worthy than others. *See Afroyim v. Rusk*, 387 U.S. 253, 262 (1967) ("Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit").

Certainly, some distinction between citizens may be necessary for proof of bona fide citizenship or for proof of allegiance and attachment to the community. *Cf. Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) (seven year citizenship requirement to run for governor). But in the case *sub judice*, the City of Camden is saying that "some citizens are more equal than others" in the area of access to private employment opportunities. Such discrimination based solely upon duration of residency was explicitly rejected when this nation adopted the Equal Protection Clause. *Zobel v. Williams, supra*, 102 S. Ct. at 2318-2319 (Brennan, J., concurring).

Office-Supreme Court, U.S.
FILED
JUL 26 1983
ALEXANDER L. STEVAS
CLERK

No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees

BRIEF OF APPELLEES

On Appeal from the Supreme Court of New Jersey

LAWRENCE R. VELVEL
Chief Counsel
State and Local Legal Center
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

Of Counsel

N. THOMAS FOSTER
City Attorney

M. ANN HOWARD
Assistant City Attorney

Office of City Attorney
13th Floor, City Hall
Camden, New Jersey 08101
(609) 757-7170

Attorneys for Appellees

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Whether appellant's challenge to provisions of a Camden ordinance has become moot because of amendments which took effect after the Court noted probable jurisdiction.

2. Whether this case fails to present a justiciable case or controversy because there has been no fact finding procedure or adjudication of facts, and no proof of injury.

3. Whether a city ordinance which requires good faith efforts to hire qualified city residents for 40 percent of the jobs on city-funded construction projects, while allowing non-city residents to obtain 60 percent of the jobs created by the City's own construction money, violates the Privileges and Immunities Clause where the enacting city is suffering from an extraordinary rate of unemployment, a precipitous decline in businesses and the jobs they provide, a steep reduction in population, and a disproportionately high rate of unemployment among members of minority groups who comprise more than 70 percent of the city population and have suffered extensive discrimination in the industry affected by the city's law.

4. Whether the ordinance described in Question 3 above violates the Equal Protection Clause when it defines a resident merely as a person who resides in the city, and has no durational requirement for residency.

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BRIEF OF APPELLEES

On Appeal from the Supreme Court of New Jersey

OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N.J. 317, 443 A.2d 148 (1982) and appears in the Appendix to appellant's Jurisdictional Statement at A1-A32.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and a Jurisdictional Statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on March 7, 1983, ____ U.S. ____, 103 S. Ct. 1270 (1983). This Court's jurisdiction is invoked by appellant under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution, Article I, §8, Cl 3:

> "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Article IV, §2, Cl. 1:

> "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Fourteenth Amendment, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutionality is at issue here was substantially changed by an amendment that took effect in July, 1983. The original ordinance is set forth in its entirety in the Joint Appendix for this matter at A36-A58. The entire amendment is set forth in Appellees' Appendix, A1-A-19. In relevant part, the amendment provides as follows:

Section 1. *Definitions*

Construction Contract—Any agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

Resident of the City of Camden—any person who resides in the City of Camden.

STATEMENT OF THE CASE

1. *The Serious Economic and Social Dilemma Faced by Camden*

Until the 1960's the City of Camden was considered the political and social capital of southern New Jersey. For the last 15 years, however, Camden has been fighting a constant uphill battle against major problems caused by urban decay and economic decline. There has been very high unemployment, a heavy loss of population, and a dramatic reduction in the number of businesses located in Camden. These problems are graphically borne out by statistics.

The unemployment situation is stark. The New Jersey Department of Labor reports that overall unemployment, which stood at 6.3 percent of Camden's total population in 1970,[1] had increased to 19.1 percent by 1983.[2] Thus, almost one-fifth of Camden's total population is out of work.

Moreover, the Department's figures underestimate the situation because they do not include all persons looking for employment. More inclusive statistics compiled by the City of Camden's Employment and Training Office show that 30 percent of the overall adult population is unemployed, and so is 45 percent of the overall youth population.

Even the latter statistics do not give the full picture, however. Minority groups comprise over 70 percent of the population of Camden: Black Americans are 53 percent of the population, and Hispanic Americans are 19.2 percent.[3] These minority groups traditionally have a higher unemployment rate than the population as a whole. In 1977, for example, when *overall* unemployment in Camden was less than 10 percent, Black unemployment was 18.4 percent (or approximately double the overall rate) and Hispanic unemployment was 15.6 percent.[4] Thus, to-

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1. Source: 1970 — Office of Demographic and Economic Analysis, Bureau of Labor Force Statistics, Division of Planning and Research, New Jersey Department of Labor.

2. Source: 1982 — Office of Planning and Management, Division of Planning and Research, New Jersey Department of Labor.

3. Source: 1980 Census of Housing and Population, U.S. Department of Commerce, Bureau of the Census. Issue date — March, 1981.

4. Source: New Jersey Department of Labor, Affirmative Action Office.

day Black Americans and Hispanic Americans in Camden undoubtedly have a higher rate of unemployment than the figures reported by the Employment Office of 30 percent for the overall adult population and 45 percent for the overall youth population.

The statistics also show that, while unemployment was on the rise, the population was dramatically declining. Camden's population was 102,551 in 1970,[5] and only 84,910 in 1980.[6] This is a reduction of 17 percent, or almost one-fifth, in only 10 years.

There was also a startling loss in the number of businesses located in Camden. The city's Employment and Training Office recently conducted a survey of retail and service establishments in Camden. It found that whereas in 1967 there had been 1,049 retail stores in the city, in 1980 there were only 558 such stores — a reduction of almost 50 percent. In 1967 there had been 496 service-related businesses, but in 1980 there were only 139, a drop of more than two-thirds. (Because of the decline in businesses, there is only one remaining major supermarket and no movie theater in the City of Camden.)[7]

The rise in unemployment, reduction in population, and loss of businesses have had harmful corollary effects. There has been a serious decline in the city's tax base, an increase in the number of people on welfare, neighborhood deterioration, and wholesale abandonment of both commercial and residential properties.

2. *The Affirmative Action Ordinance Enacted by Camden in Response To Its Problems*

Faced with this barrage of problems, the City Council of Camden responded to its "legal and moral obligation"[8] to promote the welfare of the city's citizens. The Council enacted, and subsequently amended, an Affirmative Action ordinance provid-

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5. Source: 1970 U.S. Census, PAC (1)-159, table P-2, pp. 85-92, U.S. Department of Commerce, Bureau of the Census.

6. Source: 1980 Census of Housing and Population, U.S. Department of Commerce, Bureau of the Census. Issue date — March, 1981.

7. This is so despite the fact that Camden's population is over 84,000 people.

8. Camden Revised Ordinances — MC #1653, Preamble.

ing for minority group and city resident employment on city-funded construction projects.[9]

This ordinance was enacted and amended pursuant to a New Jersey statute.[10] The State statute provides a state-wide program for affirmative action in employment on public construction, but allows a city to adopt a substitute local program to be enforced by local officials. The local program becomes legally effective if approved by the New Jersey State Treasurer.[11]

The substitute local ordinance adopted and amended by Camden requires contractors to make good faith efforts to ensure that minorities comprise 25 percent of the work force in all trades employed on city construction projects exceeding $50,000, and to make good faith efforts to ensure that residents comprise 40 percent of the entire work force on these projects. The statute provides explicit criteria for measuring a contractor's good faith efforts, and establishes an Affirmative Action Review Council which assists and monitors contractors' efforts to meet the goals of the ordinance. If a contractor makes good faith but unavailing efforts to meet the minority and residency goals, he is in no way penalized or disqualified from working on the project.

As originally enacted, the ordinance defined a resident as one who had lived in the city for the previous 12 months. The amended ordinance eliminates this 12-month requirement; it defines a resident simply as "any person who resides" in Camden.[12]

The original ordinance also applied to "the development and construction of all residential housing of four units or more," although this was always interpreted to mean only residential rehabilitation projects funded by the City. Under the amended ordinance this "residential housing" provision was eliminated to

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9. The funds used by the city to pay for construction projects affected by the ordinance come from city taxes, from municipal bond issues and from federal grant monies possessed by the city.

10. The amendments by Camden City Council took effect in July, 1983, several months after the Court noted probable jurisdiction in this case.

11. *N.J.S.A.* 10:5-36(c).

12. Appellees' Appendix at A4.

make it explicitly clear that the ordinance applies only to city-funded projects.

3. *The State Procedures Under Which Camden's Ordinance Was Approved By The State Treasurer And Then Immediately Challenged In The State Appellate Courts By Appellant*

Pursuant to the New Jersey statute under which it was passed, the Camden ordinance went before the State Treasurer's Office for approval. The approval process entailed a brief, non-judicial administrative review of the ordinance to ensure that it at least meets the minimum minority hiring goals established by the State. The City Attorney and the State Treasurer's Office exchanged letters relating to provisions of the ordinance, but, aside from statistics on unemployment in Camden, no evidence relating to the ordinance was taken.

After the ordinance was approved by the Treasurer's Office, the appellant challenged the ordinance in the intermediate appellate court for the State of New Jersey (known as the Appellate Division of the New Jersey Superior Court). This challenge was the first time appellant had participated in the process of enacting or reviewing the ordinance. (Appellant had not appeared at a public hearing held by the City Council prior to final adoption of the ordinance, and had submitted nothing to the State Treasurer.)[13]

Appellant was able to file a challenge in the state appellate courts because of unique local rules governing those courts.[14] When there has been an administrative review of the type held here by the Treasurer's Office, the local rules permit an appellate case to be filed though there was no prior adjudicatory proceedings, and no prior fact-finding procedure, before any court or agency, and though the person filing the appeal was not a party to any previous proceedings of any sort. Thus, the appeal in this case was filed without an adjudicatory record below.

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13. Other groups—e.g., an Affirmative Action Coalition—did meet with and submit information to the Treasurer's Office.

14. N.J.R. App. Pro. 2:5-6(a)

without any judicial findings of fact, and with no evidence on any subject other than some statistics on unemployment in Camden.

After appellant's appeal was filed in but before it was decided by the intermediate appellate court, the Supreme Court of New Jersey certified the appeal for immediate review in the State's high court.

4. *The Opinion Of The New Jersey Supreme Court*

In the state supreme court, the appellant challenged the 25 percent minority hiring percentage and the residential hiring provision of the Camden ordinance. However, the court below unanimously upheld the ordinance.

In regard to minority hiring, the court found that similar hiring requirements had been approved by federal courts in past cases. It ruled that this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), "la[id] to rest any doubts about the validity under the United States Constitution of state-imposed Affirmative Action requirements."[15]

The court further held that "the states have no less constitutional authority than the federal government to remedy identified past discrimination" (A15), and that the New Jersey statute under which the Camden ordinance was enacted was an effort to remedy such discrimination in the construction industry. Finally, the court pointed out that contractors were not required "to hire non-qualified employees or to disregard meaningful differences in employee qualifications."[16]

In connection with the residential hiring provision, the court initially said that due to the high percentage of minority residents in the City of Camden, "a duty to hire Camden residents could only increase the likelihood" that minority hiring goals would be met.[17] In subsequent sections of its opinion, the court upheld the provision against attack based on the Interstate

15. A15.

16. A19. Appellant has not challenged the minority hiring provision in this Court. Rather, it has acceded to the decision of the New Jersey Supreme Court on this subject.

17. A12.

Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause.

With regard to the Commerce Clause, the court noted that "[i]t is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their local ills,"[18] ills such as "the severe economic plight that has befallen the City of Camden."[19] Relying on this Court's leading decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the New Jersey court held the residential hiring provision permissible because the "City of Camden is not regulating the flow of commerce between private parties. The city is acting in the role of market *participant*, not market *regulator*." (Emphasis in original.)[20] This was "crucial" because this Court has determined that " '[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810 (footnotes omitted)." A22.

Turning to the Privileges and Immunities Clause, the court below, quoting decisions of this Court, ruled that "[t]he purpose of the Privileges and Immunities Clause is to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[21] This "equal footing" purpose was not transgressed here because, far from imposing a particular disadvantage upon citizens of other states, the ordinance "most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents."[22]

Finally, the court rejected the argument that the residency provision violated the Equal Protection Clause. The court noted that residency provisions "for municipal employees have almost

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18. A12.

19. *Ibid.*

20. A22.

21. A26, quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), quoting *Paul v. Virginia*, 8 Wall 168, 180 (1869).

22. A26.

universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare."[23] It continued by holding that "[t]he rational reasons for a city's decision to hire its own residents in direct employment . . . apply just as forcefully in the context of city contracting for public works projects. The severe unemployment in Camden and the need for economic revitalization further support the rationality of resident hiring quotas."[24]

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23. A26.
24. A28.

SUMMARY OF ARGUMENT

I

This Court is constitutionally limited to deciding "cases or controversies." There are also prudential limitations upon the Court's jurisdiction. The constitutional and prudential limits on jurisdiction ensure the presence of prerequisites to effective litigation. In this case the limitations on jurisdiction are violated, and the prerequisites to effective litigation are absent.

A. The case has largely become moot because of recent amendments to the provisions of the ordinance challenged by appellant. The amendments, which became effective after probable jurisdiction was noted, eliminated a 12-month durational residency requirement, and provided instead that a resident is simply any person who lives in Camden. The amendments also eliminated any reference to residential construction, in order to make explicitly clear that the ordinance is intended to apply only to construction funded by city monies. Thus, basic statutory conditions existing when probable jurisdiction was noted no longer obtain, and much of the argument made by appellant is no longer relevant. The Court may therefore wish to dismiss the case as moot.

B. The case is not ripe for review and presents the Court with a request for an advisory opinion. There has been no trial-type hearing before any court or agency, and no adjudication of facts. Appellant's allegations therefore present only hypothetical facts and conjectural conclusions rather than a concrete claim based upon proven facts.

The absence of a trial-type hearing, and the concomitant lack of adjudicated facts, are of special importance here and cause this case to be inappropriate for decision by this Court. Had there been a trial, Camden would have shown as a factual matter that the movement of businesses and employees to the suburbs is a major reason for the economic decline and high rate of unemployment in the city. Camden would also have shown that the ordinance has had a favorable impact upon these problems. Finally, appellant would have had to factually substantiate

its claim that the ordinance has caused out-of-city residents to be injured by losing jobs they otherwise would have obtained. The city believes this claim is factually untrue and would have rebutted it at trial.

C. Appellant lacks standing to bring this case. It has shown no proof of any injury at all, let alone injury traceable to the ordinance. The city, moreover, believes appellant *cannot* show injury to itself or members of its constituent unions.

II

A. Appellant originally claimed the Camden ordinance violated both the Interstate Commerce Clause and the Privileges and Immunities Clause. After its Interstate Commerce argument was rejected by this Court in *White v. Massachusetts Council of Construction Employers, Inc.*, __ U.S. __, 103 S.Ct. 1042 (1983), appellant formally withdrew it, and now purports to rely solely on its Privileges and Immunities claim. In fact, however, its Privileges and Immunities argument is suffused with claims normally made under the Interstate Commerce Clause, and is really an Interstate Commerce argument disguised as a Privileges and Immunities argument. If its argument were accepted, it would nullify the *White* opinion within a year of its issuance.

The *White* decision precludes such nullification. The Court there said that a residency provision is valid under the Privileges and Immunities Clause if it does not regulate all who benefit in some way from the economic ripple effect of a city project, but instead governs only those who work on a "class of economic activities in which the city is a major participant." The Camden law governs only such parties.

B. The Camden ordinance is a constitutionally permissible means of responding to dramatic city problems. It is a reasonable effort to increase employment for city residents on city-funded projects, while simultaneously permitting non-residents to obtain more than half the jobs on those projects. The law operates in an area where the city has plenary authority and control — the expenditure of its own funds for construction.

Moreover, the ordinance is in harmony with decisions of Congress and this Court. Congress has enacted, and the Court has upheld, laws providing funds for public works and directing that a percentage of the money should be set aside for minority-owned businesses. Congress' objectives were to channel funds into areas of high unemployment and to direct funds into the minority community, which otherwise would not benefit from public works programs because of extensive racial discrimination in the construction industry. The Camden ordinance as a whole, and the residency provision in particular, have the same objectives and address the same problems.

C. Appellant's arguments that the residency provision of the ordinance violates the Privileges and Immunities Clause are invalid.

1. Appellant asserts that the ordinance is illegal because unemployment is a "national problem." That unemployment exists elsewhere, however, does not preclude Camden from seeking to alleviate its own dramatic local unemployment situation by determining that a portion of its own money should go to its own residents. This is only the more true because the Camden law provides a necessary local supplement in a geographical area where congressional programs to lessen unemployment have had an inadequate impact, and because in enacting the law Camden was fulfilling the Brandeisian function of serving as a "laboratory" for the development of new programs to solve serious economic and social problems.

2. Appellant argues that parties located outside of Camden are not the "peculiar source of the evil" addressed by the ordinance, and that the law is not substantially related to alleviating the evil. Its argument is factually incorrect and would have been shown incorrect at a trial.

The high rate of unemployment in Camden is due to the flight of employed individuals and businesses to the suburbs. This flight left behind a reduced population with a high percentage of unemployed, as well as greatly diminished job opportunities. Moreover, prior to the ordinance, jobs on city construction projects were mainly filled with non-residents. For

these reasons parties now outside the city *are* the source of the evil confronting it. The ordinance directly addresses the evil, and has had a favorable impact upon it, by requiring good faith efforts to hire city residents for construction funded by the city.

3. Appellant claims the ordinance excludes members of its constituent unions from 40 percent of the jobs Camden itself has created. In fact, however, the law has not excluded any non-city resident from any job he otherwise would have obtained. The alleged "exclusion" has not excluded, and appellant has not shown anything to the contrary.

4. Appellant conjectures that the ordinance will lead other jurisdictions to enact retaliatory laws. However, there is no evidence that laws have been enacted in retaliation and no sign that they will be. Appellant's speculation cannot deprive Camden of the right to enact a law to meet a problem which is concrete rather than speculative.

5. Appellant claims the ordinance violates the principle that state citizenship cannot be the basis for discrimination, i.e., the principle that a citizen of State A must receive in State B the same privileges which accrue to the latter's citizens by virtue of their state citizenship. The ordinance does not violate this principle. Even if Camden residents obtain a preference, they do not obtain it by virtue of being citizens of New Jersey, but because they are citizens of the city. Being a citizen of New Jersey entitles no one to any preference at all, and more non-Camden, New Jersey residents are affected by the ordinance than out-of-state residents. There is thus no discrimination against out-of-state residents. In fact, there is no discrimination against anybody, since the ordinance has caused no one to lose a job he otherwise would have obtained.

6. Finally, appellant says that because the state assertedly could not pass the law enacted by Camden, the city cannot do so either. But the state *could* pass a law providing for good faith efforts to hire city residents for 40 percent of the jobs on city-funded projects in a municipality faced with economic problems of the magnitude confronting Camden. All the reasons supporting Camden's law would support the state's law.

III

The Camden ordinance is valid under the Equal Protection Clause. Appellant's argument to the contrary is directed at the 12-month durational requirement which no longer exists. Appellant's argument is thus moot.

Simple bona fide residency requirements of the type presently contained in the ordinance have repeatedly been upheld by this Court. Such a requirement does not burden travel. As well, there is no fundamental right to employment on city-funded projects. Nor is any suspect classification involved. For these reasons, the ordinance must be upheld if it is a rational means of addressing a problem. The law is a highly rational means of alleviating severe economic ills experienced by Camden.

ARGUMENT

I. THE CONSTITUTIONAL AND PRUDENTIAL LIMITATIONS UPON THIS COURT'S JURISDICTION ARE VIOLATED HERE.

Under Article III of the Constitution, the jurisdiction of this Court is limited to the resolution of "cases or controversies." As well, the Court takes account of prudential limitations on the exercise of its jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1974). The constitutional and prudential limitations on the Court's authority are expressed in a number of doctrines. Thus, the Court will not decide a moot case. It will not issue an advisory opinion. It will not adjudicate a case unless the litigation is ripe for review. Nor will it decide a case brought by a party who lacks standing.

These constitutional and prudential doctrines ensure certain prerequisites to effective litigation. They ensure that a case will present concrete facts of record, rather than matters which are merely abstract or hypothetical.[25] Likewise, they ensure that questions will be real and immediate, not merely conjectural or speculative.[25a] Finally, they guarantee that a party seeking review has or will immediately suffer an actual injury that gives him a personal stake in the controversy.[26] Such injury conduces to the full illumination of issues.

In the present case, the foregoing doctrines which limit the Court's jurisdiction are all violated. As well, the prerequisites those doctrines are designed to ensure are absent.

A. The Present Case Has Largely Been Mooted By Recent Changes In The Ordinance Being Challenged.

When probable jurisdiction was noted, the ordinance contained a durational residency requirement: a resident was defined as a person who had resided in Camden for 12 months. A provision of the ordinance also provided that the law applied

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25. *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1946).

25a. *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring).

26. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

to residential construction of four or more units (though this was always interpreted to refer only to residential construction funded by the city). The briefs on the merits filed by appellant and *amicus* New England Legal Foundation are largely directed to the durational residency requirement and the residential construction provision. This is true both as to their Privileges and Immunities argument and their Equal Protection argument.

In the summer of 1983, however, the ordinance was amended.[27] There is no longer a durational residency requirement. The definition of residency was changed so that now a resident is simply any person who lives in Camden.[28] Also, all reference to residential construction has been eliminated to make explicitly clear that the ordinance is inapplicable to projects not funded by the city. Thus, basic conditions existing when probable jurisdiction was noted no longer obtain, and much of the argument of appellant and *amicus* is no longer relevant.

In these circumstances, a significant, indeed a predominant, portion of the case has been mooted. This Court may therefore wish to dismiss this case.

B. In Its Present Posture This Litigation Is Not Ripe For Review And Presents The Court With A Request For An Advisory Opinion.

Because of the peculiarities of New Jersey procedure, the Camden ordinance went directly from a non-adjudicatory, administrative review in the State Treasurer's office to the New Jersey appellate courts. This case has never been before a state trial court, nor has there been any trial-type administrative procedure. There has thus been no adjudication of facts in this litigation.

The absence of any trial-type hearing, and the concomitant lack of adjudicated facts, are of special importance here. Had there been a trial, the city would have shown as a factual matter

27. The amended ordinance appears in Appellees' Appendix at A1-A19.

28. The ordinance thus states that a "Resident of the City of Camden" is "any person who resides in the City of Camden." Appellees' Appendix at A4.

that the movement of businesses and their employees from the city to the suburbs was a major cause (i.e., a peculiar source) of the economic decline and loss of jobs in Camden. The city would also have shown that, by requiring good faith efforts to hire city residents, the ordinance has had a favorable impact upon the problem caused by businesses and employees who have left for the suburbs. Finally, at a trial the appellant would have had to factually substantiate its claim that out-of-city residents have been injured by a loss of jobs they otherwise would have obtained. The city alleges there has been no such injury, and, at a hearing, would introduce proof to rebut any such claim of harm.[29]

Thus, due to the lack of a prior trial-type hearing and adjudicated facts, this litigation is not meet for review by this Court. Appellant presents only hypothetical facts and conjectural conclusions rather than a concrete claim based upon proven facts. In this regard, the case is very much like another New Jersey proceeding which was adjudicated by the state supreme court but was not within the jurisdiction of this Court. *Doremus v. Board of Education*, 342 U.S. 429 (1951). In *Doremus* this Court pointed out that "no trial was held and we have no findings of fact." The Court further stated that no sufficient injury had been proven. *Id.* at 432. In the circumstances, the Court said that even though a state tribunal may render an advisory opinion, this Court cannot. "[B]ecause our own jurisdiction is cast in terms of "case or controversy," said the Court, "we cannot accept as the basis for review . . . any procedure which does not constitute such." *Id.* at 434.

Doremus is applicable here. Also applicable is the principle enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1966), perhaps this Court's leading decision on ripeness. In *Ab-*

29. That the appellant and members of its unions have suffered no harm from the ordinance is the more true because the members can work on projects only if unionized contractors bid for and receive construction contracts. Here, however, unionized contractors have received only one of six contracts let for competitive bidding by the city. Nor has any union contractor ever claimed a failure to bid for or receive a contract was due to the residency requirement of the ordinance.

bott, the Court said the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-149. In the present case, the Court is asked to entangle itself in abstraction and to interfere in a decision that has not caused concrete harm.[30]

C. Appellant's Lack of Proof of Injury Also Deprives It of Standing.

In order to have standing, appellant must show "not only a distinct and palpable injury" that has been suffered or is immediately threatened, *Warth v. Seldin, supra*, 422 U.S. at 501, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1970). Appellant fails these tests because it has proven no concrete injury at all, let alone injury traceable to the ordinance.

Indeed, as said before, appellees believe appellant *cannot* prove injury to itself or to members of its unions. Six construction contracts have been awarded by Camden since the ordinance was enacted. On none of them did union members lose jobs because of the ordinance. Moreover, this experience indicates it is unlikely the ordinance will cause a loss of jobs by union members in the future. Thus, it is probable that appellant could not prove injury in a trial court. Certainly, then, its mere speculative allegations of injury are insufficient to confer standing.

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30. *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954), is also applicable. In that case there was no evidence that the members of a union had suffered the sanctions they feared. The Court said: "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." 347 U.S. at 224.

II. THE CAMDEN ORDINANCE IS VALID UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. Much of the Appellant's Privileges and Immunities Argument Is, in Reality, An Interstate Commerce Clause Argument And Was Specifically Rejected By This Court In the Virtually Identical Case of *White v. Massachusetts Council of Construction Employers, Inc.*[31]

In its Jurisdictional Statement, appellant claimed the Camden residency provision violated the Interstate Commerce Clause. This Court, of course, has held that the Interstate Commerce Clause and the Privileges and Immunities Clause have a "mutually reinforcing relationship"[32] founded upon their common origin and purposes. Both clauses stem from the Fourth Article of the Articles of Confederation, and both promote a national economic unit.

The appellant's Interstate Commerce argument was rejected by this Court in *White v. Massachusetts Council of Construction Employers, Inc., supra*. The Court there ruled that the Interstate Commerce Clause was not violated by a Boston Executive Order requiring that 50 percent of the worker hours on city-funded construction projects must be put in by bona fide residents of Boston. The Boston Order and the Camden Ordinance are virtually identical.[33] Thus, because of the decision in *White*, appellant has now formally withdrawn its Interstate Commerce argument. Purportedly, it now relies solely on the Privileges and Immunities Clause.

However, appellant's brief, as well as the brief of *amicus* New England Legal Foundation, is suffused with arguments normally made under the Interstate Commerce Clause. Appellant and *amicus* thus repeatedly claim that Camden's ordinance

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31. ___ U.S. ___, 103 S.Ct. 1042 (1983).

32. *Hicklin v. Orbeck*, 437 U.S. 519, 531 (1978).

33. The only practical difference is that Boston requires that city residents perform a higher percentage of work than does Camden.

is protectionist, will lead to interstate rivalries and retaliation, and will cause Balkanization of the national economic unit. Much of their claims are, indeed, an Interstate Commerce Clause argument disguised as a Privileges and Immunities argument. To uphold their claims would effectively nullify the recent *White* decision — which would lose all meaning less than one year after being delivered.

The opinion in *White* itself precludes such nullification. In the course of upholding the Boston Order, the *White* Court specifically discussed the circumstances under which such an economic regulation would violate the Privileges and Immunities Clause. It said a violation would exist if the regulation "is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect" of the city decision to grant a hiring preference to city residents. 103 S.Ct. at 1046, *quoting Hicklin v. Orbeck, supra*, 437 U.S. at 531. Such an uncabined regulation would extend to employees who "have no connection whatsoever with the City's economic project," and would "not [be] limited to activities connected with" the city project. *White v. Mass. Council of Construction Employers, supra*, 103 S.Ct. at 1046.

The Boston Order was permissible under the announced standards. The Order was not an effort to impose a resident-hiring requirement upon all who "benefit in some way from the economic ripple effect" of Boston's projects. Rather, it only "cover[ed] a discrete identifiable class of economic activities in which the city is a major participant." *Id.* at 1046 n. 7.

The identical situation obtains in Camden. The city is not seeking to regulate all who benefit from an economic ripple effect. Rather, it is affecting only those who directly work on projects funded by the city. It has covered only a "discrete identifiable class of economic activity in which the city is a major participant." As well, "[e]veryone affected by the [ordinance] is in a substantial . . . sense . . . working for the city."[34] *Ibid.*

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34. As in *White*, this includes subcontractors working on city-funded projects. *See* 103 S.Ct. at 1046 n.7.

B. The Camden Ordinance Is A Reasonable And Constitutionally Permissible Local Effort To Secure Jobs For City Residents on City-Funded Projects, While Allowing Non-City Residents To Obtain Over One-Half The Jobs On These Projects.

Apart from the fact that the *White* decision validates the ordinance, Camden's law is a constitutionally permissible means of responding to dramatic problems faced by the city. The law represents a reasonable effort to secure a degree of employment for city residents on city-funded projects, while simultaneously permitting non-city residents to obtain more than half the jobs on these projects.[35]

A reasonable law aiding the employment of city residents is essential because of the drastic unemployment and business situation in Camden. The City Council thus enacted an ordinance in an area where the city has plenary authority and control—the expenditure of the city's own funds for construction.[36] In making its own expenditures, of course, the city can determine who shall receive its monies. This right is possessed by any party, and is augmented by the city's role " 'as guardian and trustee for its people' " and by the "the 'long recognized right of [a] trader' . . . to exercise his own independent discretion as to parties with whom he will deal" when spending his funds in the market. *White v. Mass. Council of Construction Employers, Inc., supra.* 103 S.Ct. at 1044 n. 3.

Camden's right to enact its ordinance is further confirmed because the city acted in harmony with decisions of Congress

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35. The reasonableness of the city's ordinance is the more pronounced because, based on the decision in *White*, the city could require good faith efforts to employ Camden residents for *all* construction jobs on projects funded by the city. This could be done because the city would still be acting as a market participant rather than a market regulator; and would only be affecting those who are in a substantial sense working for the city itself, rather than affecting all who benefit in some way from the economic ripple effect of city-funded projects.

36. This Court has long recognized the legitimacy and significance of local efforts to respond to local concerns, particularly with regard to the expenditure of local revenues. See e.g. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41, 49-50 (1973).

and this Court. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court upheld a federal statute which provided funds for public works and directed that a percentage of the monies should be set aside for minority-owned businesses. Chief Justice Burger stated that the statute in question had the overall objective of channeling "funds into areas of high unemployment," and had also been intended "to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as then formulated." 448 U.S. at 459.

The Chief Justice pointed out that "Congress had abundant evidence" that minorities had been excluded by "racial and ethnic discrimination" from participation on state and local construction projects. *Id.* at 477, 478. He cited congressional statements that the percentage of minority group members benefitting from governmental procurement for construction was far less than their percentage of the population, and he said Congress had ample data from which to conclude the discrimination against minorities in the construction industry would be perpetuated in the absence of the remedial legislation under review. *Ibid.*

The Camden ordinance as a whole, and the residency provision in particular, were enacted for the same purposes and to address the same problems as the statute upheld in *Fullilove*. The ordinance directs public money into an area of high unemployment, and seeks to promote "equality of economic opportunity" for minorities. The residency clause furthers these goals. By providing that good faith efforts should be made to fill 40 percent of the affected jobs with city residents, the clause provides for expenditures of city money to address the problem of severe unemployment. As well, by providing that affected jobs should be filled with residents in a city where minorities comprise over 70 percent of the population and have a gravely high rate of unemployment, the ordinance seeks to help remedy the

discrimination historically practiced against minorities in the construction industry.[37]

C. Appellant's Privileges And Immunities Arguments Are Invalid.

Although the Camden ordinance is a reasonable effort to secure for city residents a portion of jobs available on city-funded construction projects, while permitting non-residents to obtain over half the jobs, appellant assails the ordinance as a violation of non-residents' rights under the Privileges and Immunities Clause. Appellant seeks a decision that would handcuff local governments by preventing them from enacting a reasonable response to gravely pressing local needs. It would have the Court ignore the precept that, in determining whether there has been a violation of the Privileges and Immunities Clause, "[t]he inquiry must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

Appellant makes several arguments in support of its claim that the residency provision of the ordinance violates the Privileges and Immunities Clause. None of the arguments is valid.

1. Appellant asserts the Clause is violated because unemployment is a "national problem." Thus, it says, Camden's effort to combat very high unemployment within its own boundaries is "parochial." That unemployment exists elsewhere than in Camden, however, does not mean Camden's efforts to alleviate the problem are narrowmindedly "parochial." Nor does it mean Camden is constitutionally disqualified from seeking to alleviate

37. The parallel between this case and *Fullilove* is even the more striking because some of the monies controlled and expended by Camden were granted to it under federal statutes which, like the statute in *Fullilove*, "were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed." *White v. Mass. Council of Construction Employers, Inc., supra*, 103 S.Ct. at 1047. Furthermore, because the federal statutes under which Camden received monies are two of the same laws as were discussed in the *White* case, and the Camden ordinance is virtually identical to the Order in *White*, it is as true here as in *White* that the law at issue "sounds a harmonious note" with federal policy. *Ibid.*

its own local unemployment situation by determining that a portion of its own funds should go to its own residents. To the contrary, Camden is entitled to direct its money to local citizens for the purpose of curing dramatic local ills.[38]

Not to be overlooked in this regard is that Camden is acting in harmony with programs and principles of Congress and this Court. As said before, Congress itself has enacted laws to help alleviate general and minority unemployment, and this Court has approved such programs. Camden's ordinance provides a necessary local supplement in a geographical area where Congress' programs have had an inadequate impact.

Furthermore, in enacting its ordinance, Camden was not only supplementing the laws of Congress but, independently of this, was "serv[ing] as [a] laborator[y] for the development of new social, economic, and political ideas" for solving major problems. *Federal Energy Regulatory Comm. v. Miss.*, ____ U.S. ____, 102 S.Ct. 2126, 2152 (1982) (O'Connor, J., dissenting). Justice O'Connor has recently pointed out that this "laboratory" concept of "State innovation is no judicial myth." *Ibid.* Here, Camden has promulgated a reasonable law which has had a favorable impact upon a problem that is distinctly local as well as national, and which has had such impact while preserving jobs for non-city residents. If the Brandeisian concept of the states as laboratories[39] is to have any meaning, Camden's ordinance must be upheld.

2. Appellant also claims the ordinance violates the Privileges and Immunities Clause because parties located outside of Camden are not the "peculiar source of the evil" addressed by the ordinance, and because the law is not substantially related to alleviating the evil. Appellant's arguments are simply wrong in

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38. Appellant's argument creates a curious anomaly in this regard. Appellant probably would not object to Camden giving all of its welfare money to city residents. Yet, it objects when the city directs only some of its construction money to these residents. The anomaly is the more striking because this use of construction money helps alleviate the welfare problem.

39. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fact and, had there been a trial, Camden would have shown this.

The high rate of unemployment in Camden is due to employed individuals and businesses having left the city in large numbers. This flight left behind a reduced population with a high percentage of unemployed, as well as a vastly diminished number of job opportunities. Moreover, prior to the ordinance, jobs on city construction projects were mainly filled by non-city residents.[40] For these reasons, parties now outside the city *are* the source of the evil besetting it — they are a major cause of its high rate of general unemployment and of unemployment in its construction industry in particular.

As well, the ordinance directly addresses the "evil" and, as a provable fact, has had an impact upon it. The evil is addressed by requiring good faith efforts to hire city residents, and the ordinance has had the practical effect of causing an increase in the number of such residents working on city-funded construction projects.

Nor is it factually true, as appellant hypothetically contends to be possible, that the ordinance has merely led to the hiring of previously employed city residents rather than previously unemployed ones. Rather, the law has resulted in employment for city residents who lacked work.[41] Appellant's academic argument to the contrary is without practical reality.

3. Overlooking the fact that the Camden ordinance permits non-residents to secure 60 percent of the jobs created by Camden's own money, appellant argues hypothetically that the law nonetheless must fall because it assertedly excludes members of its constituent unions from 40 percent of the jobs Camden itself has created. However, as said earlier, the law has not in fact caused any non-city resident to lose a job he otherwise would have obtained. Nor has appellant offered any proof of any

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40. Over 70 percent of Camden's population belongs to minority groups and, as has been recognized by Congress, there has been extensive discrimination against minorities in the construction industry.

41. This is not surprising, in view of Camden's predominant minority population and these citizens' gravely high rate of unemployment.

such loss.[42] Thus, appellant's argument is unfounded and unproven. The alleged "exclusion" has not in fact excluded and appellant has not shown the contrary.[43] "[P]utting aside theoretical [arguments] and looking to the practical effects" of the ordinance, it has neither fenced out nor injured the appellant or members of its constituent unions. *Austin v. New Hampshire*, 420 U.S. 656, 664 (1974).[44]

4. Appellant conjectures that the Camden ordinance will lead to the enactment of retaliatory laws by other jurisdictions. Once again, however, there is utterly no proof that any other jurisdiction has or will enact an ordinance in retaliation. Like many of its other arguments, appellant's speculative claim is insufficient to deprive Camden of the right to enact an ordinance necessary to ameliorate a dramatic problem that is concrete rather than merely speculative.[45]

5. Appellant argues the Camden ordinance gives an unlawful preference to New Jersey residents. Thus, it says, the ordinance violates the principle that state citizenship cannot be the basis for discrimination, i.e., the principle that a citizen of State A must receive in State B the same privileges which accrue to

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42. Rather than offer proof of any type, of course, appellant chose to assail the law under a procedure lacking a trial-type hearing.

43. Even if the law *had* caused non-city residents to lose some jobs they otherwise would have obtained, however, the ordinance would still be permissible for numerous reasons detailed in this brief, e.g., it would still be a reasonable and valid means of securing jobs for city residents on city-funded projects, while allowing non-residents to obtain more than half the jobs on those projects.

44. Camden has no desire to exclude or fence out appellant or members of its constituent unions. Rather than being intended to exclude such parties, the ordinance is only intended to help assure that qualified city residents also have a fair opportunity for employment. If qualified city residents were unavailable despite good faith efforts to find them, a contractor could hire 100 percent non-residents.

45. Moreover, even if other jurisdictions did enact similar ordinances, such laws might, like Camden's, be for the purpose of ameliorating a serious local problem rather than being intended to retaliate. As well, the laws, again like Camden's, might not exclude citizens of other jurisdictions, but could instead leave extensive room for them to participate on locally-funded projects.

the latter's citizens by virtue of their state citizenship. *Toomer v. Witsell*, *supra*, 334 U.S. at 395.

Camden's ordinance does not run afoul of this principle. Even if the ordinance gives a preference to Camden citizens, this preference does not arise by virtue of *New Jersey* citizenship, but because of *Camden* citizenship. Being a citizen of the state entitles *no one* to the preference, and New Jersey residents living outside of Camden do not receive it. Indeed, as the New Jersey Supreme Court pointed out, more non-Camden, *New Jersey* residents are affected than out of state residents.[46] Thus, there is no preference for New Jersey residents qua New Jersey residents, and there is no discrimination against out of state residents.

Moreover, as a practical matter, the asserted preference for Camden residents has not disadvantaged citizens of *any* area, whether they be residents of New Jersey living outside Camden or residents of a different state. As said before, there has been no showing by appellant that the ordinance has caused any non-Camden resident to lose a job he otherwise would have obtained, and the city asserts there has in fact been no such loss of jobs.[47] For this reason, too, there has been no denial to any non-New Jersey resident of a privilege accruing to New Jersey citizens.[48]

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46. A26.

47. As said before, as in *White* there is no showing that "the increased employment of city residents in publicly-funded construction projects has been accompanied by a decline in the percentage of out-of-state residents." 103 S.Ct. at 1045 n. 6.

48. *Amicus* New England Legal Foundation makes arguments additional to those raised by appellant. It asserts that Camden's law harms Camden and its citizens because the law will "unavoidab[ly]" result in the "employment of inexperienced and less qualified employees", and will result "in higher costs of public construction." *Amicus* is in effect arguing that city residents who have been kept out of construction employment because of discrimination should continue to be kept out because this will be better for Camden — which has itself decided to the contrary. The City totally disagrees with *amicus*' characterization of qualifications, costs, and economic benefits.

6. Finally, appellant claims that because the state assertedly could not enact the law passed by Camden, the city cannot do so either. But the state *could* enact the law passed by Camden (and has in fact approved it). New Jersey could promulgate a law providing for good faith efforts to hire city residents for 40 percent of the jobs on city-funded projects in a city that has experienced the high unemployment, loss of businesses, and decline in population experienced by Camden. All the reasons which support such a law when enacted by Camden would also support it if enacted by the state.[49]

III. THE CAMDEN ORDINANCE IS VALID UNDER THE EQUAL PROTECTION CLAUSE.

In its brief, appellant has argued that the Camden ordinance violates the Equal Protection Clause. Its argument, however, is directed at the former provision under which a resident of Camden was defined as a person who had lived in Camden for 12 months. In other words, its argument is directed at the durational requirement which no longer exists. Under the amended ordinance, a resident is any person who resides in Camden, no matter how brief the period of residence has been.

Appellant's argument on the durational requirement is thus moot. Nor can there be any successful attack on the ordinance as amended. Bona fide residency requirements have been continually upheld by the Court in regard to public employment, schooling, and other matters. *See e.g. McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (upholding a bona fide resident requirement for municipal employment); *Martinez v. Bynum*, ____ U.S. ____, 51 U.S.L.W. 4524 (1983) (upholding a bona fide resident requirement for tuition free public schooling).

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49. Not at issue here is whether a state could enact a law giving a 100 percent hiring preference to state residents everywhere in the jurisdiction, and doing so regardless of differences in economic conditions in different parts of the state. The only question properly under discussion here is whether a state could pass a law providing that city residents shall have a partial preference in a particular urban area facing dramatic problems such as Camden's.

A bona fide residency provision such as Camden's does not burden any right of travel.[50] This is particularly true because the Camden law does not prohibit or in any way deter an individual from traveling to Camden for the purpose of establishing residency there. (Indeed, Camden welcomes such migration.) Nor is there any fundamental right to employment on projects funded by the city. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1975). Nor is any suspect classification involved. For these reasons, the Camden law must be upheld if it is a rational means of addressing a problem. *Ibid*. As shown earlier, the law is, in fact, a highly rational means of alleviating severe economic ills.

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50. In *McCarthy, supra*, the Court ruled that the right o. vel is not burdened by a residency requirement for city employees. The situation is no different when the requirement applies to city-funded projects on which "[e]veryone affected . . . is in a substantial . . . sense . . . 'working for the city.'" *White v. Mass. Council of Construction Employers, Inc., supra*, 103 S. Ct. at 1046 n.7.

CONCLUSION

For the foregoing reasons, Appellees, Mayor and Council of the City of Camden, respectfully request this Court to affirm the judgment of the New Jersey Supreme Court upholding the validity of the City of Camden's Affirmative Action Ordinance.

Respectfully submitted,

LAWRENCE R. VELVEL
Chief Counsel
State and Local Legal Center
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Of Counsel

N. THOMAS FOSTER
City Attorney

M. ANN HOWARD
Assistant City Attorney

13th Floor, City Hall
Camden, New Jersey 08101
(609) 757-7170
Attorneys for Appellees

APPENDIX

ORDINANCE AMENDING AN ORDINANCE ENTITLED, "AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN" — MC-1650, AS AMENDED AND SUPPLEMENTED

WHEREAS, on August 14, 1980, the Council of the City of Camden adopted an Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden; and

WHEREAS, this program was amended by ordinance on September 11, 1980; and

WHEREAS, the following findings were made by the Council of the City of Camden:

1. The City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and

2. The City Council of the City of Camden, in viewing the present economic conditions which confront minority citizens within the City of Camden, and said minority citizens make up a significant portion of the population of the City of Camden; and

3. The present economic conditions nation-wide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and

4. The City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was

18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave than that which existed when the figures were compiled; and

5. The City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

6. The City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; and

WHEREAS, the current unemployment figure for the City of Camden as reported by the New Jersey Department of Labor is 19.1%; and

WHEREAS, it is necessary to amend the ordinance to promote more efficient and effective implementation of the Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden, as amended and supplemented; now, therefore

BE IT ORDAINED, by the Council of the City of Camden that:

SECTION 1. Ordinance MC-1650, adopted August 14, 1980, as amended and supplemented, shall be further amended and supplemented by the amendments attached hereto and incorporated into this ordinance by reference, set forth in separate from covenience, understandability and economy.

SECTION 2. This amendment shall not be interpreted as a waiver of any requirements on any contract or project that is currently subject to the provisions of MC-1650 as amended and supplemented.

SECTION 3. All ordinance or parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed.

SECTION 4. Any ordinance not amended or supplemented herein is saved from repeal and shall remain in full force and effect.

SECTION 5. This ordinance shall take effect 20 days after final passage and publication as required by law.

Dated: June 9, 1983

The above has been reviewed
and approved as to form:

City Attorney

President, City Council

Mayor

AFFIRMATIVE ACTION ORDINANCE

Section 1. *Definitions*

1.1 For the purpose of this ordinance, unless the context clearly dictates otherwise, the following terms shall have the following meanings:

Advanced Trainee — a worker who is classified by a party acceptable to the N.J. Department of Treasury, Affirmative Action Office as having experience and skills used in a particular craft or occupation, but lacking the skills to be qualified as a journeyworker.

Apprentice — A worker who is a trainee and individually registered in a bona fide apprenticeship program with the U. S. Department of Labor Manpower Administration, Bureau of Apprenticeship and Training with a State Apprenticeship Program.

Construction Contract — Any agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

Developer/contractor — any party performing or offering to perform a "construction contract".

Journeyworker — a worker who has been certified by a party acceptable to the N.J. Department of the Treasury Affirmative Action Office as having mastered a craft or trade.

Minority — includes persons who are either Black, Hispanic, Asian, Native American, or women, as those terms are defined herein:

Black: all persons having origins in any of the Black racial groups of Africa.

Hispanic: all persons of Mexican, Puerto Rican, Cuban, Central or South American origin, regardless of race.

Native American: all persons having their origin in any of the original peoples of North America.

Asian: all persons having their origin in any of the original peoples of the Far East, Southeast Asia, Indian subcontinent, or Pacific Islands.

Minority-owned business — any business enterprise in which more than half of the beneficial interest in such business enterprise is held by individuals who are members of a minority and of which more than half the net profits or losses are attributable to the efforts of an are distributed to members of a minority and which is certified by the Affirmative Action Review Council as such. For the purpose of qualifying as a minority-owned business, the contractor may be required to submit additional information to the Affirmative Action Review Council.

Construction site — the geographical location where the erection, repair or alteration described in the construction contract is performed.

Resident of the City of Camden — any person who resides in the City of Camden.

Subcontractor — a third party that is engaged by the Developer/Contractor to perform all or part of the work included in the construction contract.

Trainee — a worker who is not eligible for an apprentice program and is certified as having no previous experience and skills used in a particular craft or occupation, but has demonstrated an interest in acquiring same and agreed to enter into an approved on-site and off-site training program.

Section 2. *Affirmative Action Review Council*

2.1. There is hereby established an Affirmative Action Review Council of the City of Camden with the powers and duties hereinafter provided.

2.2. *Membership*

A. The Affirmative Action Review Council shall consist of seven (7) members. Initially the composition of the Affirmative Action Review Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a period of one (1) year; thereafter, all members of such Council shall be appointed for a term of two (2) years.

B. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The Mayor shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractors' associations, government and the minority community. The Mayor and City Council shall appoint individuals to the Affirmative Action Review Council who are committed to the letter and spirit of this ordinance and the purpose and principles which it seeks to advance.

C. Members of the Affirmative Action Review Council may be removed for non-performance or neglect of duties or for other good cause by the Mayor with the concurrence of the majority of City Council.

D. Members of the Affirmative Action Review Council shall serve without compensation.

E. Vacancies in the Affirmative Action Review Council, for whatever reason, shall be filled in the manner herein provided for new appointments.

2.3. *Powers and Duties*

The powers and duties of the Affirmative Action Review Council shall included the following:

A. Adopting of rules and procedures for the regulation and conduct of its meetings.

B. Evaluating the initial workforce report and other relevant information submitted by the developer/contractor who is the apparent low bidder and the known principal sub-contractors in order to determine the adequacy of the developer/contractor's plan to attain the hiring goals established in Section 4.1 and the minority business enterprise goal established in Section 5.1.

C. Making recommendations to Camden City Council regarding the award of contracts that are subject to the provisions of this ordinance.

D. Reviewing any contracts awarded that are subject to the goals enumerated in Section 5.2 and 5.3 and making recommendations to the Department of Administration and, where appropriate, to Camden City Council.

E. Monitoring and enforcing the affirmative action performance of contractors subject to the provisions of this ordinance.

F. Supplying information to all minority organizations who request information regarding minority participation in proposed projects.

G. Establishing and improving formats for reports, schedules and such other documentation that may be reasonably required to implement this ordinance.

Section 3. *Contract Compliance Officer*

3.1. *Powers and Duties*

In addition to any other powers and duties that may be assigned to the contract compliance officer by law, ordinance, regulation or administrative directive, the Contract Compliance Officer of the Contract Compliance Unit of the Office of the City Attorney of the City of Camden shall also:

A. Act as Liaison between the Affirmative Action Review Council and the Contract Compliance Unit of the City of Camden.

B. Gather all information necessary for the Affirmative Action Review Council to make a determination of the adequacy of an apparent low bidder's plan to attain the goals established in this ordinance.

C. Monitor the affirmative action performance of persons subject to the provisions of this ordinance.

D. Report to the Affirmative Action Review Council a contractor/developer's performance with respect to the provisions of this ordinance and recommend to the Affirmative Action Review Council such action that may be proper to correct non-compliance with this ordinance.

E. Issue "Alert Notices" and "Violation Notices" for Contractor's failure to comply with workforce commitments under this ordinance.

F. Provide information and referrals to the City of Camden, Bureau of Purchasing regarding Minority Business Enterprises as well as monitoring the City's compliance with Section 5.2 and 5.3 of this ordinance.

G. At the request of the Affirmative Action Review Council, perform other tasks reasonably necessary to facilitate the functions of the Affirmative Action Review Council and to facilitate the implementation of this ordinance.

Section 4. *Construction Contract Hiring Goals*

4.1 For any "construction contract" in excess of $50,000.00, there are hereby established the following goals for employment at the construction site:

A. 25% of the work hours shall be furnished by minority workers.

B. 40% of the work hours shall be furnished by City residents.

4.2. To the extent practicable, the goals set forth in paragraph 4.1 shall apply to each and every trade, craft or skill employed to perform the construction contract and shall be reflected throughout the various levels of employment within each trade, craft or skill; however, in no event shall the total work hours furnished by minority workers and City residents be less than the goals established in paragraph 4.1.

4.3 In determining the total work hours to be furnished at the construction site, there shall be included the number of hours devoted to all tasks customarily performed on a construction site whether or not such tasks are, in fact, performed on the construction site.

Section 5. *Minority Business Enterprise Goals*

5.1. The developer/contractor shall assure that 25% of the dollar cost of any construction contract exceeding $50,000.00 shall be awarded to minority business enterprises as defined in this ordinance and as certified as such by the Review Council.

5.2. To the extent permissible under the provisions of the New Jersey Public Contracts Law, the City of Camden shall ensure that a fair and substantial portion of those publicly funded City construction contracts valued at less than $50,000.00, but in excess of $4,500.00, are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 35% of the total dollar amount of such contracts awarded annually.

5.3. To the extent permissible under the provisions of the New Jersey Public Contracts Law, the City of Camden shall ensure that a fair and substantial portion of publicly funded service and purchase contracts, valued at less than $4,500.00 are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 50% of the total dollar amount of such contracts awarded annually.

Section 6. *Developer-Contractor's Contracting Obligation*

6.1. A developer/contractor to whom Sections 4 and 5.1 are applicable, shall submit copies of this ordinance to all subcontractors and shall make compliance with it, a specification of all bids. The developer/contractor shall provide in any request for bids by a subcontractor that the subcontractor's submission of a bid shall institute his/her agreement that he/she will comply with the requirements of this ordinance.

6.2 The developer/contractor when hiring for jobs and selecting minority business enterprises shall make a good faith

effort to insure that the goals set forth in Sections 4 and 5 of this ordinance shall be met. In the event that a developer/contractor shall fail to meet the goals set forth in Sections 4 and 5 of this ordinance, the Affirmative Action Review Council shall determine whether or not the developer/contractor has in fact made a good faith effort at compliance. This determination by the Affirmative Action Review Council shall be made in accordance with the criteria set forth in Section 9, paragraphs 9.2 and 9.3 of this ordinance.

6.3 The developer/contractor shall ensure that any sub-contractor working on any part of the project under a subcontract exceeding $25,000.00 and involving in excess of eighty (80) worker hours, shall employ minority apprentices in each trade to work such total hours that shall equal at least 10% of the hours worked by the journeyworkers employed in the same trade.

6.4 It is not the intent of this ordinance to alter any collective bargaining agreements between the developer/contractor and his sub-contractors and their various unions provided, however, the existence of a term and condition in such an agreement which by its terms precludes compliance with the terms of this ordinance shall not excuse a person from his duty to comply with this ordinance.

6.5. Each developer/contractor or sub-contractor will notify the Camden Contract Compliance Officer whenever he/she has reason to believe that any union which has a hiring hall or referral arrangement or an apprenticeship program engages in such referral, membership, admission or other practices as will substantially impede the contractor in his/her efforts to meet the Affirmative Action obligations under this ordinance.

6.6. The developer/contractor shall submit copies of the collective bargaining agreement covering workers to be employed on the project, and copies of such bargaining agreements of each sub-contractor.

6.7. The developer/contractor shall designate a principal officer of its firm to be responsible for administering the Affirmative Action Program detailed herein. This officer shall meet regularly, or as may be required, with the Contract Compliance Officer for Camden and/or the Review Council to ensure attainment of the goals set forth herein and the implementation of the training program. Included in this obligation is the requirement that each developer/contractor and sub-contractor keep and maintain records for all trainees so that separate payroll amounts and descriptions of payments, training progress, together with all benefits, are recorded separately.

Section 7. *Pre-award Conference*

After bids are received for a particular construction contract subject to the provisions of Section 4 and Section 5.1, and prior to award of such a contract by Camden City Council, the apparent low bidder and the known principal sub-contractors, will be required to attend a pre-award conference with the Contract Compliance Officer. The purpose of the Pre-award Conference will be to evaluate the developer/contractor's Affirmative Action plan or plans to comply with the provisions of this ordinance and its past performance with respect to Affirmative Action.

The evaluation shall focus on the developer/contractor's commitments to:

a. Cooperate with the unions with which the contractor has agreements in the development of programs to assure qualified members of minority groups of equal opportunity in employment in the construction trades.

b. Improve opportunities for the upgrading of the job titles of the minority group members of the construction force.

c. Actively seek union membership for qualified minority members of the construction force.

d. Make certain that all recruiting activities are carried out on a non-discriminatory basis.

e. Make known to all of the sub-contractors, employees and sources of referral, its equal employment opportunity policy.

f. Encourage minority group sub-contractors to bid for sub-contracting work.

g. Demonstrate how minimum requirements and goals, as set forth in the within ordinance, will be met.

Section 8. *Reporting Requirements and Contract Monitoring*

For all contracts subject to Section 4 and Section 5.1 the following requirements will apply.

8.1. The contractor and each sub-contractor whose contract(s) exceeds $25,000.00, shall complete and submit a Work Force Table. This document shall identify the estimated workforce requirements for the duration of the job, broken down by trade and month. This document shall be revised as required, but not less than once a month. A developer/contractor's failure to provide this document or its furnishing substantially false or misleading information in this document shall be considered non-compliance with the terms of this ordinance.

8.2. The developer/contractor must submit to the Contract Compliance Officer the developer/contractor's weekly payroll records for all crafts covered under the contract provisions. In addition, a monthly cumulative summary of project workforce must be provided on a craft-by-craft basis and the individuals comprising the workforce must be identified as to their minority or non-minority status and residence.

8.3. The developer/contractor shall, on the last working day of each month, submit to the Contract Compliance Officer, a written narrative describing its efforts to ensure compliance with this ordinance. The report will include an ap-

praisal as to the effectiveness of the developer/contractor's program and will specify those factors and conditions which impede, restrict or account for less than complete success of the program.

8.4. The developer/contractor shall permit access to weekly certified payroll records for all employees covered under the contract.

8.5. The developer/contractor shall continually monitor personnel activities to ensure that the provisions of this ordinance and the developer/contractor's Affirmative Action plans are being met.

Section 9. *Criteria for Measuring Good Faith*

9.1. In the event of failure by a developer/contractor to meet the minority and City resident workforce requirements and the Minority Business Enterprise requirements set forth in Section 4 and Section 5 of this ordinance, the developer/contractor shall be given an opportunity to demonstrate that every good faith effort has been made to meet these requirements. In any proceeding in which such good faith is an issue, all of the actions of the developer/contractor, in seeking to comply with these requirements, shall be reviewed and evaluated by the Affirmative Action Review Council in light of the criteria set forth below. Compliance with these conditions shall be monitored by the Contract Compliance Officer.

9.2. A developer/contractor's good faith efforts with regard to minority and City resident workforce requirements shall be measured by:

a. The developer/contractor's efforts to actively solicit City residents and minorities as members of the workforce to be employed in connection with the construction contract and to solicit sub-contractors employing City residents and minorities.

b. The developer/contractor's efforts to notify the Affirmative Action Review Council of opportunities for minority and City resident participation in proposed projects. The Affirmative Action Review Council shall place notifications in area publications, including minority publications, and shall also notify non-profit minority organizations regarding such employment opportunities.

c. The consideration given by the developer/contractor for employment as journeymen, trainees, advanced trainees and apprentices to persons referred by any training source approved by the Review Council.

d. Size of developer/contractor's workforce. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the developer/contractor, as an employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

9.3. Good faith efforts with regard to Minority-owned Business Enterprise participation shall be measured by contractor's efforts to:

a. Inform associations, groups and organizations of bid specifications within a reasonable time of the closing date for bid submission.

b. Actively recruit minority business enterprises to bid on sub-contracts.

c. Limit the size and dollar volume of sub-contracts to the extent feasible and to otherwise arrange solicitations and completion dates in order to make it possible for minority business enterprises to bid and compete for said contracts.

d. Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insur-

ance through normal channels, assume the responsibility for meeting such requirements or otherwise making appropriate arrangements which shall eliminate these requirements as obstacles to the granting of the sub-contract to such minority business enterprise.

e. Notify the Affirmative Action Review Council of outstanding subcontracting needs and consider for subcontracting purposes minority-owned business referred by the Affirmative Action Review Council. If the contractor does not use the sub-contractors so referred, it shall submit a written explanation to the Affirmative Action Review Council within three business days of the reference.

f. Solicit minority participation through advertising in area publications, including minority publications.

g. Inform area non-profit minority organizations of opportunities.

h. Provide whatever other counseling or assistance as may be necessary during the preparatory stages and the actual performance of such sub-contracts.

i. Offer to assist minority business enterprises in entering into joint ventures with others for the purpose of accomplishing a total sub-contract, if they so desire.

j. Document the above.

Section 10. *Non-compliance*

10.1. In the event of developer/contractor's failure to meet the requirements of this ordinance, the Contract Compliance Officer shall take the following steps:

a. Issue a written "Alert Notice" to a developer/contractor and to appropriate unions whenever, in his or her opinion, the developer/contractor is not in compliance with the provisions of this ordinance or the rules and regulations issued pursuant thereto.

b. If the Alert Notice is not removed within three (3) working days by a correction of the deficiencies, the Contract Compliance Officer shall follow up the Alert Notice by issuing a written "Violation Notice". Upon

the issuance of such notice, the developer/contractor will have seven (7) working days to correct the violation. If the violation has not been corrected within that period the Contract Compliance Officer will make recommendations to the Review Council of action to be taken by the City of Camden.

10.2. Either or both notices described above may be removed by the Contract Compliance Officer if the developer/contractor meets its obligations under this ordinance or if it presents a satisfactory explanation, in writing, as to why such compliance is impractical or impossible provided, however, such action by the Contract Compliance Officer shall be subject to the review of the Affirmative Action Review Council.

10.3. In the event that the requirements of this ordinance have not been met by a developer/contractor and it is determined by the Affirmative Action Review Council that a "good faith effort" has not been made, the Affirmative Action Review Council shall recommend to the Business Administrator and the particular department acting as the funding source, one or more of the following actions:

a. Hold a meeting of all parties to attempt an amicable resolution of the determination of non-compliance by the Affirmative Action Review Council.
b. Require the developer/contractor to comply with the terms of this ordinance through the appropriate legal action.
c. Withhold payments under any contract or grant which may be due or owing to any developer/contractor.
d. Require the developer/contractor to enforce his obligations under his contract with contractors and sub-contractors by litigation at law or in equity, whichever is appropriate.
e. Recommend termination or suspension of the contracts in whole or in part to the City Council.
f. Take all other actions available at law or in equity for the breach of this agreement an act of irresponsibility

by the contractor which the City may take into account in evaluating future bids by that contractor within the parameters of the local Public Contract Law of the State of New Jersey, *N.J.S.A.* 40A:11-1, *et seq*.

h. Notify the Affirmative Action Officer of the State of New Jersey of the developer/contractor's non-compliance.

10.4. The use of any or all of the above remedies shall rest within the discretion of the Business Administrator with the advice of any and all department heads which he or she deems fit. Failure to so act shall not be considered as a waiver of any provision or right contained within this ordinance.

Section ~~11~~. *Union Statements*

When a developer/contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such developer/contractor shall submit with its bid a statement signed by an authorized union official, in which the union agrees as follows:

a. Said union is aware of the terms, conditions and goals of the within ordinance.

b. Said union shall make a good faith attempt to assist the developer/contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance. A sub-contractor will promptly notify the developer/contractor and the Affirmative Action Review Council of any failure on the part of a union to comply with the provisions of the above described statement. If a union has refused to sign the statement described above, the developer/contractor will document his/her efforts to obtain such statement, including a description with the reasons given by the union for not signing such statement, and submit such documentation, together with his/her bid. A bid shall be deemed unresponsive if un-

accompanied either by an acceptable union statement or by documentation as to why such a statement could not be obtained. In addition, the award of a contract or sub-contract will not be approved if such contractor has not submitted an acceptable union statement, or an explanation of the failure to obtain a statement. The failure of the union to sign the statement described above does not excuse the developer/contractor from his/her obligation to comply with the conditions and provisions of this ordinance.

Section 12. *Sub-contractors*

12.1. Each developer/contractor shall be responsible for the performance of its sub-contractors in the implementation of the provisions of this ordinance during the performance of the contract. Whenever a developer/contractor sub-contracts a portion of the work on a project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he/she were the developer/contractor. Furthermore, the developer/contractor must include a provision in all contracts with sub-contractors to ensure compliance with all other conditions included herein, as well as with the New Jersey Executive Order 21 and *N.J.S.A.* 10:2-1 through *N.J.S.A.* 10:2-4, the President's Executive Order No. 11246 (C.F.R. 12319-25), *N.J.S.A.* 10:5-31, *et seq.* and Chapter 127 of Public Laws of 1975.

Section 13. *Governmental Requirements*

13.1. All developer/contractors shall comply with any and all applicable federal or state requirements for equal opportunity, but compliance with the same shall, in no way, excuse any non-compliance with any specific requirements as set forth in the within ordinance.

13.2. All advertisement and solicitation of construction contract bids must contain the following language: "Bidders are required to comply with P.L. 1975, C.127."

Section 14. ***Outreach and Training***

On construction contracts of 2.5 million dollars or more, the City must set aside ½ of one percent of the total project cost to be used for outreach and training of minorities and females, if necessary, for the contractor to meet the hiring goals.

NO. 81-2110

Office - Supreme Court, U.S.
FILED
JUL 27 1982
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF ON BEHALF OF APPELLEE, DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey,
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 30 Park Place, Newark, New Jersey 07102—(201) 623-8611

Questions Presented

1. Does the Privileges and Immunities Clause of the Constitution of the United States foreclose a municipal government from requiring that its contractors undertake good faith efforts to employ a work force on municipal construction projects that includes municipal residents so that forty percent of the work performed will be performed by municipal residents.

2. Does a municipal regulation granting a limited preference to bona fide residents of the municipality in employment on public works contracts undertaken for the municipality represent a denial of equal protection to individuals who do not reside in the municipality.

3. Whether the Court has jurisdiction under Article III of the Constitution over a challenge to a provision of the Camden ordinance limiting enjoyment of the resident hiring preference to individuals who have resided in Camden for one year prior to an application for employment when the durational residency requirement has been eliminated by amendments to the ordinance adopted while this appeal has been pending in this Court.

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NO. 81-2110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF ON BEHALF OF APPELLEE, DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

Statement of the Case

This is an appeal from a portion of a final judgment of the Supreme Court of New Jersey entered in an action by the United Building and Construction Trades Coun-

cil of Camden County and vicinity (Council) challenging a determination by the Chief Affirmative Action Officer in the Department of Treasury of the State of New Jersey. By letter of November 24, 1980, the Chief Affirmative Action Officer approved an affirmative action program for construction contractors engaged in certain public works contracts for the City of Camden, New Jersey (A60 to A61).* The approved program stated that the contractor was to make every effort to employ persons residing in the City of Camden and went on to provide that "in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden" (A56). The program defined a resident of the City of Camden as any person who has been domiciled in the City for a continuous period of twelve consecutive months prior to the making of an application for employment (A38). The Council contended before the Supreme Court of New Jersey that the resident hiring requirements contravened the Constitution of the United States, invoking the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of New Jersey rejected the Council's constitutional challenge and affirmed the Chief Affirmative Action Officer's approval of the Camden affirmative action program.

In 1975, the Legislature of the State of New Jersey enacted amendments to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-31 to 38. The enactment mandated that no public works contract be awarded by the State or any of its political subdivisions unless there has been agreement by the contractor to afford equal

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* The citations to the Appendix refer to the Appendix to the Jurisdictional Statement of the Appellant.

opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer. N.J.S.A. 10:5-32. The Act required certain prospective bidders on public works contracts to formulate and submit to the State Treasurer for his review and approval an affirmative action program whereby the contractor "guarantees minorities employment in all employment categories." N.J.S.A. 10:5-34. In N.J.S.A. 10:5-36, the State Treasurer was empowered to determine the percentage of minority groups in the State, or areas of the State from which the workforce for public contracts may be drawn, and to promulgate such percentages as guidelines for determining the adequacy of affirmative action programs submitted for approval. In addition, the Treasurer was authorized to require any State or local agency awarding public works contracts to submit their affirmative action programs for approval. N.J.A.C. 10:5-36(c).

In 1977, the State Treasurer promulgated rules and regulations governing the approval of affirmative action plans submitted by construction contractors. N.J.A.C. 17:27-6.1 to 6.5. Minority hiring goals were established for each of the State's 21 counties. N.J.A.C. 17:27-7.3. The regulations mandated the use of specific contract language whereby the contractor agreed to undertake good faith efforts to achieve the minority employment goals. N.J.A.C. 17:27-7.4. Other contractual provisions concerning compliance with the affirmative action plan as well as agreements not to engage in unlawful discriminatory employment practices were established as necessary elements of an affirmative action program. N.J.A.C. 17:27-6.2.

As an alternative to individualized review and approval of construction contract affirmative action plans, the Treasurer's regulations allowed any public agency of the State

to promulgate its own affirmative action program for construction contracts. A public agency program must be submitted to the State Treasurer for designation as a State approved program. N.J.A.C. 17:27-6.5(a). To secure State designation, the program must require the agency's construction contracts to include agreements against certain unlawful discriminatory employment practices, and must establish an employment goal for minorities which is not less than that prescribed for the county by N.J.A.C. 17:27-7.3. *See* N.J.A.C. 17:27-6.5(b). Once approved, the public agency's program exclusively establishes the affirmative action procedures and requirements for the public agency's construction contracts. N.J.A.C. 17:27-6.5(a).

In July of 1980, the City of Camden acted to establish a State-approved affirmative action program for construction contracts to be performed for or on behalf of the City. As indicated by the results of the 1980 census, at least 75%, and perhaps as many of 90%, of the City's residents are members of groups designated as minorities in the Camden program (A10).* The unemployment

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* Minority is defined in the Camden program to include Blacks, Hispanics, Women, Asians and American Indians (A37 to A38). The 1980 U.S. Census Bureau statistics indicate as follows concerning the Camden population:

Total Population	84,910
Caucasian	25,739
Black	45,008
American Indian/Eskimo	193
Asian/Pacific Islands	278
Other	13,692

A total of 16,308 Camden residents identified themselves as of Hispanic origin. It is unclear whether these individuals are reflected in any of the figures stated above with regard to other groups (A10).

rate for the City generally averages two or three times the national rate. The City of Camden has one of the highest uncollectible tax rates in the State of New Jersey. The residential tax base is small and consists of very modest homes. Industrial and commercial values in the City have declined over the last three decades. *See Camden* v. *Skokowski*, 88 N. J. 304, 305, 441 A.2d 741, 742 (1982).

On August 28, 1980 the Camden City Council adopted an ordinance to establish an affirmative action program for its construction contracts (A36 to A53). The ordinance stated that its adoption was prompted by the serious economic conditions confronting the significant minority population in the City. The ordinance stated that

> . . . the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and county-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City of Camden by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly. . . . [A36 to A37]

The ordinance indicated that its purpose was to relieve the problem of unemployment confronting the citizens of Camden and to promote involvement by members of minority groups in the City's construction projects (A37).

The Camden ordinance represented an affirmative action program which satisfied the minimum requirements for designation as a State-approved plan by the State Treasurer. The Camden plan provided that construction contractors were "to make every effort to employ not less than 25% minority workers" (A40 to A41). This minority hiring goal exceeded the 20% goal established by the State Treasurer for the County of Camden. *See* N.J.A.C. 17:27-7.3. The Camden affirmative action program also went beyond the minimum State requirements by inclusion of a provision whereby contractors were "to make every effort to employ persons residing within the City of Camden but in no event shall less than 40% of the entire labor force be residents of the City of Camden" (A56). The resident hiring preference was made part of the Camden plan by amendments to the August 28, 1980 ordinance adopted on September 11, 1980 (A54 to A56). The Camden program defined resident of the City of Camden to mean

> . . . any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence. [A38]

On November 24, 1980, the Chief Affirmative Action Officer for the State Department of Treasury approved the Camden program because it met the minimum requirements prescribed by N.J.A.C. 17:27-6.5(b) for designation as a State-approved plan. The Council appealed this determination to the Appellate Division of the Superior

Court of New Jersey. Prior to argument or decision in the Appellate Division, the Supreme Court of New Jersey assumed jurisdiction of the appeal by direct certification pursuant to N.J. Court Rule 2:12-1. The Council challenged the City's minority hiring goals on various State statutory and constitutional grounds and also contended that the minority hiring goals violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In addition, the Council challenged the resident hiring requirements on the basis that they violated the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause.

By decision entered on February 18, 1982, the Supreme Court of New Jersey rejected all of the contentions raised by the Council (A1 to A32). The Court ruled that the minority hiring goals were consistent with State statutory and constitutional law and did not violate the Equal Protection Clause.* The New Jersey Court also held that the resident hiring requirements did not contravene the Constitution of the United States (A21 to A28). With regard to the Commerce Clause, the Court concluded that in promulgating a resident hiring preference, the City was merely prescribing the terms and conditions of the City's participation in the construction market. The City was not regulating "the flow of commerce between private parties" (A22). Since the City was acting in the role of a market participant rather than as a market regulator, the Commerce Clause did not foreclose the City from promulgating a limited hiring preference for its own residents. The City's action, in the Court's view, fell squarely within the holdings of this Court in ***Reeves,***

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* The Council has not appealed from this part of the judgment of the Supreme Court of New Jersey. *See* Jurisdictional Statement at 10, n.19.

Inc. v. *Stake*, 447 U.S. 529 (1980) and *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The New Jersey Court's reading of *Alexandria Scrap* and *Reeves* was entirely in accord with this Court's decision last term in *White* v. *Massachusetts Council of Construction Employees, Inc.*, —— U.S. ——, 103 S.Ct. 1042 (1983), which held that the City of Boston may, as a market participant immune from scrutiny under the Commerce Clause, require that the construction work on City projects undertaken with City funds be performed by a work force comprised of at least 50% Boston residents.*

The Supreme Court of New Jersey also concluded that the City's resident hiring preference did not violate the Privileges and Immunities Clause. The purpose of the Clause is to place the citizens of each state upon the same footing as citizens of other States. As the Court stated

> For this reason the clause is not invoked to strike down local ordinances that favor city residents. Clearly, the Camden affirmative action plan does not aim primarily at out-of-state residents. It most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect "the States . . . treatment of each other's residents" [citing *Hicklin* v. *Orbeck*, 437 U.S. 518, 523 (1978)], it does not violate any privilege of state citizenship. . . . [A26]

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* The Council had initially sought review of the Supreme Court of New Jersey's conclusions concerning the Commerce Clause. However, in light of the Court's decision in *White*, it has abandoned its appeal on this issue. See Appellant's Brief, at 10, n. 25.

The Court therefore refused to apply the Privileges and Immunities Clause "in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality" (A27).

Finally, the Supreme Court of New Jersey concluded that the resident hiring preference did not violate the Equal Protection Clause. The Court noted that residency requirements for municipal employees have been generally upheld as a rational means of furthering the City's public welfare. Like the right to a City job, the right to employment on a local public works job is not fundamental for purposes of equal protection analysis. The Court concluded that extension of the hiring preference to City residents would not violate the Equal Protection Clause if rationally based. In the Court's opinion, there was a rational basis for the preference because residency may supply an incentive for better performance as well as advance the economy of the locality (A27). In addition, the Court stated that the severe unemployment in the City of Camden, and the need for economic revitalization also support the rationality of the resident hiring preference (A28).

On June 23, 1983, the Camden City Council adopted an ordinance which amended the provisions of the City's affirmative action program as set forth in the ordinances adopted by the Council on August 28, 1980 and September 11, 1980. The newly enacted ordinance served to clarify the previous affirmative action plan and also to significantly modify certain provisions. In Section 4 of the 1983 ordinance, goals for employment were established for all construction contracts whose cost exceeds $50,000.00. The City's goals were that 25% of all work hours on a construction project be furnished by minority workers, and 40% of all work hours on the

project be furnished by City residents. Section 9 of the 1983 ordinance made clear that the contractor would be required to demonstrate that a good faith effort has been made to achieve both the minority and the resident hiring goals.* In addition, the 1983 ordinance indicated that the affirmative action program applied to

> Any agreement for the erection, repair or alteration of any building, structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

The affirmative action program enacted in 1980 had extended its coverage to all expenditures by the City for construction contracts, the extension of financial benefits, other than property tax abatements which exceed $50,000.00 in value, and to the development of residential housing of four units or more (A54 to A55). Finally, the 1983 ordinance amended the definition of a resident of the City of Camden to mean "any person who resides in the City of Camden," thereby removing the 12 month durational residency requirement as a prerequisite to enjoyment of the hiring preference.

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* In its February 18, 1982 opinion, the Supreme Court characterized the resident hiring preference as a "quota" (A21). This was so because the Camden plan's criteria for measuring good faith compliance with the minority hiring goals did not appear directly applicable to the resident hiring requirements. The Supreme Court said of the minority hiring goals that "The ordinance's criteria for good faith compliance confirm that the hiring goals are not immutable quotas" (A14). Since the 1983 amendments make good faith efforts the benchmark for compliance with the resident hiring requirements, it may fairly be said that they no longer have the flavor of an "immutable quota."

Summary of Argument

This appeal raises the question of the validity under the Privileges and Immunities Clause and the Equal Protection Clause of a resident hiring preference adopted by the City of Camden with respect to certain construction contracts undertaken for or on behalf of the City of Camden. When this matter was before the Supreme Court of New Jersey, the resident hiring preference was as set forth in two ordinances adopted by the City Council on August 28, 1980 and on September 11, 1980 (A36 to A58). These ordinances required that City residents fill 40% of the available positions on City construction contracts. The construction contracts to which this preference applied were those whose cost exceeded $50,000.00, and were contracts that involved the expenditure of public funds from any source, contracts in which the City had conferred a financial benefit on a party other than a property tax abatement, and contracts for the construction of residential housing of four units or more (A54 to A55). In addition, the ordinances established a durational residency requirement which limited the enjoyment of the resident hiring preference to individuals who resided in Camden for one year prior to an application for employment on a City construction project.

In June of 1983, the City Council amended its ordinances. The amendatory ordinance required that a construction contractor for the City undertake good faith efforts to meet the City's goal that 40% of the work hours on a City construction project be furnished by Camden residents. The City's resident hiring goal applied to City construction contracts funded in whole or in part by the City or funded with monies which the City administered in accordance with the terms of a grant. In addition, the June 1983 amendments provided for the deletion of the one-year durational residency requirement.

The Council's constitutional challenge to the Camden resident hiring preference must be considered in light of the 1983 amendments, and the Court must review the judgment below in light of the law "as it now stands, not as it once did." *Hall* v. *Beals*, 396 U.S. 45 (1969). Since the Camden ordinance no longer includes the one-year durational residency requirement, the Council's appeal on this issue is now moot. The Council's case as to the durational residency requirement no longer presents a live justiciable controversy and the Court is without jurisdiction under Article III of the Constitution to entertain this portion of the appeal.

The Council's challenge to the Camden resident hiring preference under the Privileges and Immunities Clause rests upon the contention that the Clause applies to classifications based upon municipal as well as state residency. Needless to say, no decision of this Court is cited to support such an interpretation of the Privileges and Immunities Clause. Indeed, the Court's decisions have considered the Clause only in the context of state statutes which classify individuals based upon the fact of *state* residence. The decisions reflect the long held understanding that the purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869).

The Council's interpretation of the Clause is totally at variance with this long held view of the reach of the Clause and is also at odds with the underlying purpose of the Clause. It is well established that citizens may not challenge the laws of their own state on a claimed violation of the Privileges and Immunities Clause. *Slaughter House Cases*, 16 Wall. 32, 77 (1872). Accordingly, the Clause would not provide a basis for a resi-

dent of New Jersey who does not reside in Camden to challenge an ordinance granting a hiring preference to Camden residents. Were the Clause to be interpreted to allow residents of states other than New Jersey to challenge a hiring preference limited to Camden residents, individuals from other states will be permitted to stake a claim to rights which New Jersey residents living outside of Camden may not claim under the Constitution. The Privileges and Immunities Clause was designed to foster equality, not inequality, among the citizens of the states, and the goal of equality can be achieved only if the Clause is held to apply to state statutes which distinguish between residents of the *state*, and non-residents of the *state*.

Even if the Council's interpretation of the Clause is correct, the Camden resident hiring preference would nevertheless not contravene the Privileges and Immunities Clause. The Clause forecloses distinctions between non-residents and residents only with regard to "basic and essential activities, interference with which would frustrate the purpose of the formation of the Union." *Baldwin* v. *Montana Fish and Game Comm'n.*, 436 U.S. 371, 387 (1978). Individuals employed as workers on city construction projects are "working for the city," *White* v. *Massachusetts Council of Construction Employers, Inc.*, —— U.S. ——, 103 S.Ct. 1042, 1046, n. 7 (1983), and there is no fundamental right to governmental employment. *Massachusetts* v. *Murgia*, 427 U.S. 307 (1976). A municipal residency preference such as that adopted by Camden does not represent a virtual exclusion from the ability to pursue a common calling in the jurisdiction as was the case in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The ability to seek employment on all, rather than some, of the available jobs on the

City's construction projects is not therefore a "basic and essential activity" within the meaning of the Privileges and Immunities Clause. Moreover, the fact that the preference directly relates to contracts of a state or local government is a crucial factor to be considered in weighing the constitutionality of the resident hiring preference. The government's proprietary interest is clear. A hiring preference for residents of Camden, included as a condition to the City's contracts, is merely the exercise of a power that is an incident to the sovereignty of state and local governments. And in imposing such a condition to favor its own residents the City has not interfered with the exercise of an activity which bears "upon the vitality of the Nation as a single entity." *Baldwin, supra* at 383. The Clause was not designed to override the exercise of the sovereign power of state and local governments in this limited area of governmental contracting.

As the Council's challenge to the Camden resident hiring preference under the Privileges and Immunities Clause should fall, so too should its challenge under the Equal Protection Clause. The ordinance as amended in 1983 establishes a clear bona fide residency requirement. An individual need only reside in the City to qualify for the preference. The preference, as stated above, does not deny to nonresidents the exercise of any fundamental right. It need only be shown to be rationally based in order to pass muster under the Equal Protection Clause. *Martinez* v. *Bynum*, —— U.S. ——, 103 S.Ct. 1838, 1842, n. 7 (1983). The City clearly has an interest in seeing that its residents benefit from some of the employment opportunities created by the City's construction program. *Id.* 103 S.Ct. at 1842. This alone is a sufficient basis for adoption of the preference. It must be emphasized that Camden is a City with a minority population which

represents 75% to 90% of its total population. Unemployment in the City generally exceeds the national rate, and the unemployment among the minority population of Camden is particularly acute. In 1980, the City's unemployment rate was 11.5%. In 1983, the rate rose to 19.1%. Unemployment among the minority population has been even greater.

As the Supreme Court of New Jersey stated below, the resident hiring preference may gave City workers an incentive for better performance. It is designed to help reduce the severe unemployment problems among City residents, and it is designed as another means to advance the goal of fostering participation by minority workers in City construction projects. The resident hiring preference is justified by the need for economic revitalization in a City plagued by three decades of economic decline. Clearly the resident hiring preference is rationally based, and does not violate the Equal Protection Clause.

ARGUMENT

POINT I

The limited resident hiring preference established by the City of Camden for construction contracts performed for or on behalf of the City does not contravene the Privileges and Immunities Clause.

A. The Privileges and Immunities Clause does not apply to classifications drawn on the basis of municipal as opposed to state residency.

In its decision in this case, the Supreme Court of New Jersey concluded that the resident hiring preference for available jobs on construction contracts performed for

or on behalf of the City of Camden does not violate the Privileges and Immunities Clause. The Court held that the Clause does not foreclose the enactment of local ordinances that favor city residents because such regulations are not aimed primarily at those who reside in states other than the state in which the municipality is located. A resident hiring preference for Camden residents affects New Jersey residents who do not reside in Camden just as it affects residents of other states. The Camden ordinance does not deny to out-of-state citizens any privilege of citizenship shared by the citizens of New Jersey (A26). Clearly, the decision of the Supreme Court of New Jersey is in accord with the purposes of the Privileges and Immunities Clause and with the decisions of this Court.

The Privileges and Immunities Clause of the Constitution of the United States secures to the citizens of each state "all Privileges and Immunities of citizens in the several states." The Clause "establishes a norm of comity," *Austin* v. *New Hampshire*, 420 U.S. 654, 660 (1975), that is to prevail "among the states with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The purpose of the Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869). The Clause requires that with regard to those privileges and immunities "bearing upon the vitality of the nation as a single entity," the states must treat their own residents and residents of other states equally. *Baldwin* v. *Montana Fish and Game Comm'n.*, 436 U.S. 371, 383 (1978).

The history of the Privileges and Immunities Clause makes clear that the Clause was designed to further

the development of a single nation from separate and individual states. The source of the Clause was the fourth Article of Confederation which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .

The fourth Article was intended to arrest a "centrifugal tendency" among the confederated states, and the Article was carried over into the Constitution with the apparent design to strengthen the Union. *Austin* v. *New Hampshire, supra* at 660-661. Indeed, James Madison had commented concerning a plan of union proposed by William Paterson:

> Will it prevent trespasses of the States on each other? Of these enough has already been seen. He instanced Acts of Virginia and Maryland which give a preference to their own citizens in cases where citizens [of other States] are entitled to equality of privileges by the Articles of Confederation. [1 M. Ferrand, *Records of the Federal Convention* 317 (1911)]

The disunity which so concerned the framers was that resulting from certain regulatory actions by the states

of state-wide impact which could hinder the development of a single Union. This "centrifugal tendency" among the states could result in distinctions drawn by a state between its own citizens and citizens of other states. Such distinctions, to the extent that they involved "privileges" and "immunities" which bear upon the "vitality of a nation as a single entity," *Baldwin* v. *Montana Fish and Game Comm'n., supra* at 383, could undermine the goal of forming a single Union from individual sovereign states. There is no indication that the framers were animated by any concern other than the extension by a *state* of certain "privileges" and "immunities" to its citizens and the denial of the same to the citizens of all other states.

The decisions of the Court are entirely in accord with this view of the scope and meaning of the Clause. As the Court explained in *Paul* v. *Virginia, supra* at 180:

> . . . The privileges and immunities secured to citizens of each State in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their Constitution and Laws by virtue of their being citizens.

And, in *Woodruff* v. *Parham,* 8 Wall. 123, 147 (1869), the Court stated:

> The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not,

> therefore, an attempt to fetter commerce among the States, or deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama.

More recently, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court stated that the Clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Id.* at 395. Chief Justice Vinson noted that the Clause was not absolute but nonetheless did foreclose "discrimination against *citizens of other States* where there is no substantial reason for the discrimination *beyond the fact that they are citizens of other States.*" *Id.* at 396 (emphasis added). The *Toomer* Court made plain that the Clause proscribed classifications based upon non-citizenship "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398.

The decision of the Court in the *Slaughter House Cases*, 16 Wall. 32 (1872) should lay to rest any notion that the Clause applies to anything other than distinctions drawn on the basis of *state* citizenship. The Court made clear that the Clause could not be invoked by citizens of a State to challenge the laws of their own State. This was so because the Privileges and Immunities Clause did not create rights deemed to be fundamental "privileges" and "immunities," and did not limit a State's power to define the rights of its own citizens. The sole purpose of the Clause

> . . . was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same,

> neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction. . . . [*Id.* at 77]

The protections of the Clause extend only to citizens of states other than those in which the recognized "privileges" and "immunities" are claimed or exercised, *ibid;* and the Clause protects such individuals from the denial of those "privileges" and "immunities" when there is no substantial reason for the denial other than the fact that they are citizens of other states. *Toomer* v. *Witsell, supra* at 396.

In light of the above, it is hardly surprising that the Privileges and Immunities Clause has only been considered by the Court in the context of classifications drawn on the basis of *state* residency. In *Hicklin* v. *Orbeck, supra,* the Court held that an Alaska statute which required the employment of qualified Alaska residents in preference to residents of other states in the performance of certain oil and gas related contracts was violative of the Privileges and Immunities Clause. Similarly, in *Austin* v. *New Hampshire, supra,* the New Hampshire Commuter Income Tax was declared to be in violation of the Clause because it fell exclusively upon the income of non-residents of the State of New Hampshire. *See also Doe* v. *Bolton,* 410 U.S. 179 (1973), (Georgia statute limiting the availability of abortion services to Georgia residents violates the Privileges and Immunities Clause); *Baldwin* v. *Montana Fish and Game Comm'n., supra,* (Montana statutory elk-hunting license scheme imposing higher license fees on non-residents of Montana not within the category of rights protected by the Clause); *Toomer* v. *Witsell, supra,* (South Carolina statute requiring non-residents of South Carolina to pay a fee 100 times greater than that required of South Carolina resi-

dents for a commercial shrimp license contravened the Clause); *Canadian Northern Ry. Co.* v. *Eggen*, 252 U.S. 553 (1920) (Minnesota statute establishing shorter period for the commencement of certain civil actions by nonresidents of Minnesota than that applicable to Minnesota residents not violative of the Privileges and Immunities Clause); *Blake* v. *McClung*, 172 U.S. 239 (1898), (Tennessee statute contravened the Privileges and Immunities Clause when it granted Tennessee residents preference in the distribution of assets of certain corporations); *Ward* v. *Maryland*, 12 Wall. 418 (1871), (Maryland Law which required those not permanent residents of Maryland to obtain a license to sell goods other than those produced or manufactured in Maryland violated the Clause); *Paul Virginia*, *supra*, (Virginia law requiring insurance companies not incorporated under Virginia law to secure a license to do business from Virginia not violative of the Privileges and Immunities Clause).*

In this case, the Supreme Court of New Jersey was correct in its conclusion that the Privileges and Immunities Clause did not apply to a local ordinance favoring municipal residents. The hiring preference for Camden residents is not aimed primarily at out-of-state residents. The preference is denied to New Jersey residents who do not reside in Camden just as it is denied to residents of Pennsylvania and Delaware. Where, as here,

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* The decisions of the Supreme Court of New Jersey are also consistent with this interpretation of the Privileges and Immunities Clause. *See Salorio* v. *Glaser*, —— N.J. ——, ——A.2d ——(1983) (New Jersey Emergency Transportation Tax which fell only on residents of New York violated the Privileges and Immunities Clause); *Rubin* v. *Glaser*, 83 N.J. 299, 416 A.2d 833 (1980), app. dism. 449 U.S. 977 (1980) (State law granting property tax rebates for homesteads of New Jersey citizens and residents only did not violate the Clause).

citizens from *all* of the states of the nation are included in the class that is denied a preference, it cannot be said that the classification is one which raises the spectre of national disunity that so concerned the framers of the Privileges and Immunities Clause. The Camden ordinance does not involve a "discrimination *against citizens of other States* where there is no substantial reason for the discrimination *beyond the fact that they are citizens of other States.*" *Toomer* v. *Witsell, supra* at 396 (emphasis added).*

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* The Council cites several cases wherein lower courts applied the Privileges and Immunities Clause to classifications of local rather than state-wide application. See Appellant's Brief at 32-33, n. 50. However, the decided cases are not uniform and other courts have reached a contrary conclusion. In *Barker Printing Co.* v. *Local No. 734, Brotherhood of Painters,* 12 F.2d 945, 949-950 (D.N.J. 1926), the court stated:

> Had the rule in question drawn a specific line of demarcation, basing its operation avowedly upon differences in state citizenship, I can conceive that such differentiation would constitute an unlawful and forbidden discrimination; but as I read the rule, it is not subject to that interpretation, concerning itself in nowise with state lines, but applying to anybody and everybody who essays to do business outside his home city, whether it be in a neighboring town in his own state, or in some distant foreign jurisdiction. In other words, this rule applies with equal force and effect to everybody, regardless of state residence, who is similarly situated, and in such application, I take it, frees itself of the charge of effecting an unlawful discrimination.

In *Rothermel* v. *Meyerle,* 136 Pa. 251, 20 A. 583, 587 (Sup. Ct. Pa. 1890), the court stated as follows:

> . . . Article 4, §2, of the federal constitution, provides that the citizens of each state are entitled to all the privi-

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The Council contends that the decision of the Supreme Court of New Jersey should be reversed because the Privileges and Immunities Clause applies to classifications based on municipal as well as state residency. The Council is an association of labor unions whose members include persons who reside in Camden, persons who reside in New Jersey although in places other than Camden, and persons who reside in States other than New Jersey (Appellant's Brief at 4-5). The contention that the Camden resident hiring preference violates the Privileges and Immunities Clause can only be asserted on behalf of those who live outside of the State of New Jersey. *Slaughter House Cases, supra.* Since the Camden hiring preference is denied to a class of persons that include residents of *all* states, this challenge to the ordinance under the Privileges and Immunities Clause is based upon the contention that the ordinance may not be *applied* to citizens of states other than New Jersey. Thus, the Council is asserting in this case, on behalf of some of its members, that citizens of all states except New Jersey may not be denied a claimed "privilege" that is not shared equally by all citizens of New Jersey. These out-of-state citizens are claiming a constitutional right to a "privilege" which citizens of New Jersey who do not reside in Camden may not claim from

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leges and immunities of citizens of the several states. Citizens of other states, therefore, must be accorded the same rights under our laws as the citizens of Pennsylvania. But the discrimination contained in the act of 1861 is not against citizens of other states more than the citizens of our own state, nor against foreign markets more than domestic markets. It is directed not against citizens of other states, but against non-residents of the county of Berks, and against markets outside of that county.

the State of New Jersey under the Privileges and Immunities Clause. The result which the Council seeks is to accord to out-of-state citizens rights which are more expansive than those exercised by all New Jersey citizens who do not reside in Camden.

The result which the appellant seeks in this case cannot be squared with the fundamental purpose of the Privileges and Immunities Clause. The Clause is designed to place the citizens of each state upon an equal footing with citizens of other states with regard to certain basic "privileges." *Paul* v. *Virginia, supra.* The Clause was not designed to give out-of-state citizens rights to exercise "privileges" which some citizens of the state in which the claim is asserted do not exercise, and can not demand. The purpose of the Privileges and Immunities Clause was not to promote inequality among the citizens of the several states, and its purpose of placing the citizens of the several states upon an equal footing can not be advanced if the Clause is held to apply to any "privilege" which is not extended to all citizens of a state.

In support of its argument that the Clause must apply to classifications based upon municipal as well as state residency, the Council contends that a municipality may not engage in action that would be unconstitutional if undertaken by the state (Appellant's Brief at 26). While it is true that the City of Camden, as a political subdivision of the State of New Jersey, is subject to the State's legislative control, this does not alter the plain fact that the Camden hiring preference is limited to Camden residents. For purposes of the Privileges and Immunities Clause, the question is of the scope and applicability of the resident hiring preference. A state could clearly legislate a resident hiring preference for

all local construction projects that was limited to residents of the locality in which the project is undertaken.* Such legislation would not involve a discrimination aimed at residents of other states. And, as argued in part (b), even when a state does legislate a hiring preference for all of its residents and denies the preference to citizens of all other states, a state does not trench upon the exercise of a basic or essential activity which bears upon the vitality of the nation as a single entity and the preference does not violate the Privilege and Immunities Clause.**

The Council also argues that the Privileges and Immunities Clause will be nullified if its application is limited to classifications based on *state* residency. It is suggested that the unity of the nation could be undermined by actions of independent municipalities just as by the action of sovereign states (Appellant's Brief at 29-30). The Council posits a scenario where each municipality of the State of New Jersey enacts a hiring prefer-

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* The Boston Executive Order challenged in *White* v. *Massachusetts Council of Construction Employees, Inc.*, —— U.S. ——, 103 S.Ct. 1042 (1983), was derived from a State statute encouraging Massachusetts communities to institute similar measures. See *White, supra*, 103 S.Ct. at 1053 (Blackmun, J., dissenting).

** Under N.J.S.A. 34:9-2, citizens of New Jersey are entitled to a preference in employment for construction of any public work undertaken for "the State, or any county, city, town, township or borough, committee, commission or any board, committee, commission or officer thereof." This Act was declared to be a violation of the Privileges and Immunities Clause in *Neshaminy Constructors, Inc. Krause*, 181 N.J. Super. 367, 437 A.2d 733 (Ch. Div. 1981), aff'd —— N.J. Super. —— (App. Div. 1982). An appeal from that judgment is now pending in the Supreme Court of New Jersey, and the Attorney General of New Jersey is contending in that case that the Act is constitutional.

ence for its own residents on local public works projects with the result that residents of each city in New Jersey can work in their own city and inhabitants of Delaware and Pennsylvania can work nowhere in New Jersey. This could lead to what the Council calls "back-door" balkanization.

The appellant's argument falls wide of the mark. When a single municipality adopts a resident hiring preference for the municipality's construction projects, its action simply does not raise the spectre of the dissolution of the nation into "a league of states." *Paul* v. *Virginia, supra* at 180. Indeed, the Council seems to concede as much by suggesting that the so-called threat of national disunity would arise only if the action of the municipality is taken in concert with every other municipality of the state. Under the Council's extreme hypothetical, scrutiny under the Clause would be triggered by uniform municipal regulations which have, at least as far as out-of-staters are concerned, a state-wide impact. Even were it to be concluded that in these limited circumstances scrutiny under the Privileges and Immunities Clause might be warranted, certainly the regulation at issue in this case in no way approaches the sort of regulatory scheme envisioned by the appellant.*

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* The Council suggests that an expansive interpretation of the Privileges and Immunities Clause is justified by what it calls the "analagous situation" in *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951). (Appellant's Brief at 34). That case held that certain municipal regulations on the sale of milk violated the Commerce Clause in that they served to practically exclude the sale of out-of-state milk in the City. *Dean Milk* is not analagous. That case made clear that municipal regulations may burden interstate commerce and violate the Commerce Clause. Simply because municipal regulations of interstate commerce are

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The appellant also relies upon Justice O'Connor's concurring opinion in *Zobel* v. *Williams*, —— U.S. ——, 102 S.Ct. 2309 (1982), a case concerning an Alaska statutory scheme which provided for the annual distribution of state funds to Alaska residents. Under the Alaska law, each adult resident received a dividend unit for each year of residency subsequent to 1959. The Court held that the distribution scheme violated the Equal Protection Clause. In Justice O'Connor's view, the Alaska scheme violated the Privileges and Immunities Clause because the Alaska statutes classified Alaska citizens on the basis of their former residential status. As Justice O'Connor stated, "Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable terms than those who arrived earlier." *Id.*, 102 S.Ct. at 2321.

An ordinance, like that adopted by the City of Camden, is clearly distinguishable from the Alaska statutory scheme at issue in *Zobel*. The distinction drawn in the Alaska statutes could be said to have been based upon the fact of non-residency in the State of Alaska. The Alaska law established a preferred class of Alaska residents including only those who resided in the State in 1959. All residents of other States who migrated after that time were placed in less-favored classes depending

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subject to scrutiny under the Commerce Clause does not mean that the Privileges and Immunities Clause must be read as applying to all classifications based on residency, whether municipal or state. If the Council is contending that the reach of the Commerce Clause and the Privileges and Immunities Clause are the same, then it should be prepared to concede that the exception for state and local governments under the Commerce Clause when participating in the market should similarly apply under the Privileges and Immunities Clause. *White, supra.*

upon the date of migration. Thus what might be called a "privilege" was extended to all who were Alaska residents in 1959, and denied to all who later moved to Alaska from other States after that date. The extent of the denial was lessened, not eliminated, to the extent the migration occurred in each succeeding year after 1959. A preference granted to municipal residents, on the other hand, is not based upon an individual's status as a citizen of a state either now or in the past. In the context of the Camden ordinance, a person may move from Pennsylvania to a New Jersey municipality other than Camden. The resident hiring preference would not extend to that person because the individual is not a resident of Camden *not* because the individual moved from another State. Accordingly, Justice O'Connor's views of the reach of the Privileges and Immunities Clause would not extend to the ordinance at issue in this matter.

In sum, the Supreme Court of New Jersey was clearly correct in its conclusion that the Privileges and Immunities Clause did not apply to a classification based on municipal residency. Its decision was consistent with the long held understanding of the reach of the Clause and the decisions of this Court. The judgment of the Supreme Court of New Jersey should therefore be affirmed.

B. Even if the Privileges and Immunities Clause is held to apply to classifications based upon municipal as well as State residency, the Clause does not foreclose a municipal government from requiring its contractors to make good faith efforts to employ a work force that includes municipal residents so that a percentage of the construction work for the municipality will be performed by municipal residents.

In *White* v. *Massachusetts Council of Const. Employers, Inc., supra,* the Court concluded that the Commerce Clause did not stand as a bar to the enforcement of an executive order by the Mayor of the City of Boston which required that all construction projects funded in whole or in part with City funds, or funds which the City was empowered to administer, should be performed by a work force comprised of at least 50% Boston residents. As to those projects undertaken by the City with its own funds, the Court concluded that the City was acting as a participant in the market rather than in the role of a market regulator. The executive order was therefore held to be within the exception from the constraints of the Commerce Clause enunciated in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and in *Reeves, Inc.* v. *Stake, supra.* As the Court stated in *Hughes,* there is "nothing in the Commerce Clause [that] prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp., supra* at 810.

It is undisputed that the resident hiring preference in the Camden ordinance at issue in this case is virtually indistinguishable from that at issue in *White.* The Council has therefore declined to press its Commerce Clause challenge to the Camden ordinance. (Appellant's Brief at 10, n. 25). The Council nonetheless urges the Court to find what was constitutional under the Commerce

Clause to be unconstitutional under the Privileges and Immunities Clause. Notwithstanding the Council's arguments to the contrary, the Privileges and Immunities Clause, like the Commerce Claues, does not stand as a bar to a municipal government's requiring its contractors to undertake efforts to employ municipal residents in the performance of construction projects for or on behalf of the municipality.

The Court, in *Baldwin* v. *Montana Fish and Game Comm'n, supra,* emphasized that state citizenship or residency may be used by a state to distinguish among persons and the Privileges and Immunities Clause erects no absolute bar against such distinctions. A state is not required by the Clause to make all of its services or resources available to all, resident or nonresident, on an equal basis. *Cf. Reeves, Inc.* v. *Stake, supra.* As Justice Blackmun wrote for the Court in *Baldwin*:

> Some distinctions between residents and nonresidents merely reflect the fact that this is a nation composed of individual states, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those states. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the nation as a single entity must the State treat all citizens, resident and nonresident, equally [*Baldwin* v. *Montana Fish and Game Comm'n, supra* at 383]

The Privileges and Immunities Clause forecloses "unnecessary distinctions" between residents and nonresidents *only* with respect to the exercise of certain clearly defined fundamental rights. These fundamental rights are "basic and essential activities, interference with which would frustrate the formation of the Union." *Id.* at 387.

In limiting the enjoyment of the hiring preference to its own residents, Camden has clearly not trenched upon any fundamental right protected by the Privileges and Immunities Clause. The right of individuals to seek employment on construction projects undertaken for the City of Camden is clearly not a fundamental right for purposes of the Privileges and Immunities Clause. The right of governmental employment per se is not fundamental. *Massachusetts* v. *Murgia*, 427 U.S. 307, 313 (1976). Although the individuals employed as construction workers on the City's projects are direct employees of the City's contractors, rather than the City, this is a distinction without a constitutional difference. Here, as in *White* v. *Massachusetts Council of Construction Employers, Inc., supra*, all individuals employed by the City's contractors, are for all practical purposes, "working for the city." *Id.*, 103 S.Ct. at 1046, n. 7. *See also People ex rel. Holland* v. *Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469 (1975) (Illinois statute granting employment preference for Illinois residents on public works projects does not violate the Privileges and Immunities Clause).

Notwithstanding the Court's holding in *White*, the Council insists that this case involves the right to pursue a common calling. But this clearly is not so for the right claimed in this matter is simply the right to pursue a common calling on a construction project for the City of Camden. While the right of a nonresident to pursue a common calling in a state other than his own has been held to be a right protected by the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra*, (Commercial shrimping a common calling), the right of a nonresident to pursue his livelihood through employment on a construction project performed for a governmental entity in a state other than his own it not. No decision of this Court so holds. Indeed the Court's holding in

McCarthy v. *Philadelphia Civil Service Comm'n.*, 424 U.S. 645 (1976), militates against such a conclusion. There the Court rejected a constitutional challenge to a continuing residency requirement for employment on a city fire department. The individual had moved his permanent residence from Philadelphia to New Jersey and challenged his dismissal as violative of the Equal Protection Clause. As the Court stated:

> In this case appellant claims a constitutional right to be employed by the City of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim [*Id.* at 646-647, emphasis in original].

See also Detroit Police Officer's Ass'n. v. *Detroit*, 385 Mich. 519, 190 N.W.2d 97 (1971), app. dism. 405 U.S. 950 (1972).

Although the Appellant places substantial reliance upon the decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), that case too does not support the contention that the Privileges and Immunities Clause secures the right to pursue a livelihood on construction projects undertaken for or on behalf of the City of Camden. In *Hicklin*, Alaska had legislated a resident hiring preference with respect to certain oil and gas leases that extended, as the Court stated:

> . . . to employees who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who in turn, perform work for contractors despite the fact that none of these employers may

> themselves have direct dealings with the State's oil or gas or ever set foot on State land . . . [*Id.* at 530]

The Court stated further that a state's ownership of property is often "*the* crucial factor" (emphasis added) to be considered in determining whether a discrimination against non-residents violates the Privileges and Immunities Clause. Although the ownership factor may be dispositive in many cases, it was not depositive in *Hicklin* because Alaska had "little or no proprietary interest in much of the activity covered by the Alaska statute." *Id.* at 529.

In this case, the City's proprietary interest is clear and the resident hiring preference is strictly limited on this basis. The hiring preference applies only to a designated percentage of the employment opportunities on the City's construction projects. No individual is absolutely excluded from pursuing his or her livelihood in the City of Camden and there is no total exclusion of nonresidents from *all* employment opportunities on the Camden projects.* This is not, then, a case like *Hicklin* where a State or local government has legislated a hiring preference for its residents which extends to contractual arrangements where the City as "little or no proprietary interest." *Ibid.*

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* The appellant states that the Camden resident hiring preference denies to out-of-state residents access to a "significant" portion of the employment opportunities in Camden. There is nothing in the record to support that statement. There are no facts in the record of this case to explain what effect, if any, the Camden hiring preference has had upon non-residents of New Jersey. The record does not disclose whether any members of labor organizations represented by the Council has ever been denied employment on a Camden construction project by reason of the operation of the resident preference challenged in this case.

Hicklin's recognition that a state's proprietary interest in its own contractual arrangements as a limit to the reach of the Privileges and Immunities Clause was in accord with the decision in *Baldwin* v. *Montana Fish and Game Comm'n, supra*, where the Court also emphasized that a state's ownership of a resource is a critical factor to be considered in determining whether a state must permit residents and nonresidents to share equally in the enjoyment of the state's resource. It had earlier been held that the Privileges and Immunities Clause did not apply to a state's regulation of that which it owned. In *Corfield* v. *Coryell*, 6 F.Cas. 546, 552 (No. 3, 230 C.C. E.D. Pa. 1825), Justice Washington, sitting as Circuit Justice, concluded that while the Clause foreclosed the states from interfering with the right of a citizen of one state to pass through another for purposes of trade, the Clause did not bar the State of New Jersey from limiting access to oyster beds owned by the State to its own residents.

The *Baldwin* Court explained that the Court's more recent cases has indicated that a state's power to regulate that which it owns may need to give way to the limitations of the Commerce Clause, a proper exercise of federal power, or a right of a nonresident protected by the Privileges and Immunities Clause. *Id.* at 386. Even so, the *Baldwin* Court refused to discard the ownership principle, a principle grounded upon considerations of state sovereignty and upon the fact that "this is a nation composed of individual states." *Id.* at 383.

It is important to note that the Court has long viewed the power of State and local governments over their own contracting arrangements as broad. A governmental entity retains the power "to determine those with whom it will deal, and to fix the terms and conditions upon which

it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). And in *Atkin* v. *Kansas*, 191 U.S. 207, 222 (1903), the Court said that it "belongs to the State as guardian and trustee for its people to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *See also Heim* v. *McCall*, 239 U.S. 175, 191 (1915). By incorporating a resident hiring preference as a term in its construction contracts, the City has done no more than act consistently with this recognized power and with the essential purpose of all governments to serve its citizens. *Reeves Inc.* v. *State, supra*, at 442.

In this area of employment upon state and local public works projects, the ownership principle removes a state from any mandate under the Privileges and Immunities Clause to "apply all of its laws or all its services equally to anyone, resident or nonresident." *Baldwin, supra* at 383. The right of employment in this limited area of economic activity is not fundamental. Since the projects are sponsored by state and local governments, considerations of state sovereignty suggest that the pursuit of employment opportunities on the governmental projects is not an activity which would frustrate the formation of the Union. Rather, deference to the State's proprietary interest in this area only reaffirms the basic principle of the federal system established by the Constitution that this nation is a nation composed of individual states. *Id.*

A limitation upon the reach of the Clause in this limited area is also entirely consistent with the Court's decisions under other constitutional provisions dealing with state regulation of its own property and resources. Only last term, in *Martinez* v. *Bynum*, —— U.S. ——, 103 S.Ct. 1838 (1983), the Court upheld a Texas statute which denied free admission to public schools for a minor

living apart from parents, guardians or others having lawful control, if his presence in the school district is for the primary purpose of attending the free public schools. The residency requirement "further[ed] the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.*, 103 S.Ct. at 1842. *See also Vlandis* v. *Kline*, 412 U.S. 441 (1973), (State has a legitimate interest in protecting the right of its bona fide residents to attend its colleges and universities on a preferential tuition basis); *Reeves, Inc.* v. *State, supra*, (State may, in times of shortage, limit sales of cement produced at State-owned plant to State residents); *American Yearbook Co.* v. *Askew*, 339 F.Supp. 719 (M.D. Fla. 1972) (three-judge court), summarily aff'd 409 U.S. 904 (1972) (State may require that all public printing be performed in the State).*

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* The Court of Appeals of New York in *Salla* v. *County of Monroe*, 48 N.Y. 2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert.* den. sub. nom. *Abrams* v. *Salla*, 446 U.S. 909 (1980), held that the Privileges and Immunities Clause was violated by a New York law which mandated preferential employment of New York citizens on public works projects. The New York Court rejected the state ownership theory as an exception to the Clause and its decision was based largely upon the fact that the project at issue in the case was financed by the federal government. The Court appears to have given no consideration to the specific federal conditions attached to the funding. Its conclusion is therefore of questionable validity because applicable federal regulations may sanction local hiring preferences. *White, supra*, 103 S.Ct. at 1047. The New York Court also gave no consideration to the decisions which hold that there is no fundamental right to governmental employment. In addition, the Court of Appeals took the view that the state ownership principle did not override the right of a citizen of one state to pursue his vocation in another. But the New York statute did not foreclose absolutely the pursuit of a commercial livelihood. It merely denied out-of-state

(Footnote continued on following page)

The Council argues that the fact that Camden, like Boston in *White* v. *Massachusetts Council of Construction Employers, Inc., supra,* is acting as a market participant when including a resident hiring preference as a term of its construction contracts, should not relieve the City from the contraints of the Privileges and Immunities Clause. The Council contends that there are "vital differences" between the reach and purposes of the Privileges and Immunities Clause and the Commerce Clause under which the Boston executive order was reviewed in *White.* In the Council's view, the Privileges and Immunities Clause proscribes all distinctions based on residency, and in weighing such distinctions the characterization of the government's role is irrelevant. (Appellant's Brief, at 42-43).

The Council's arguments are clearly without merit. The Privileges and Immunities Clause is not absolute, *Toomer* v. *Witsell, supra* at 396. The Clause does not proscribe *all* classifications based on state citizenship or residency. *Baldwin* v. *Montana Fish and Game Comm'n, supra* at 383. A government's role as a market participant is clearly not irrelevant because the Court has recognized the continuing validity of the state ownership principle as a limitation upon the reach of the Privileges and Im-

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(Footnote continued from preceding page)

residents a right to pursue a vocation in a limited area of commercial activity sponsored by the state and local governments of New York. As Judge Gabrielli stated in dissent:

> . . . The statute does not prevent out-of-State laborers from coming into the State and securing jobs in their accustomed field; rather it simply establishes as a matter of public policy, that when the State of New York enters the market place as a purchaser of services, it will use its bargaining power to promote the interests of its citizens [*Id.,* 48 N.Y.2d at 528, 423 N.Y.S.2d at 885]

munities Clause. *Baldwin, supra* at 384-387; *Hicklin* v. *Orbeck, supra* at 529. Thus, the decision in *White* cannot be simply dismissed. Indeed, *Hicklin* v. *Orbeck, supra,* underscored the relationship between the Privileges and Immunities Clause and the Commerce Clause. Both constitutional provisions reflect a "shared vision of federalism." *Id.* at 532. The "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause suggests that there should be no difference between the conclusion reached in *White* under the Commerce Clause and the conclusion reached in this case under the Privileges and Immunities Clause.

This is particularly true where there is absolutely no difference in the underlying contentions. Here the argument is made that individuals are constitutionally permitted to pursue their livelihoods on municipal construction projects unencumbered by any preference favoring municipal residents. Here the argument is made that a resident hiring preference for local construction projects undermines the free flow of trade in the national marketplace. But there is no reason why these same contentions should succeed under the Privileges and Immunities Clause where they failed under the Commerce Clause. In this case, as in *White,* the Court should hold that the Constitution does not foreclose a municipal government from preferring its own residents to the extent that the municipal government, by reason of its own contracting arrangements, makes employment opportunities available on public works projects undertaken for the municipality.

POINT II

The appellant's challenge to the durational residency requirement of the Camden hiring preference is moot since the City has eliminated the durational requirement by amending the ordinance and the ordinance as amended establishes a bona fide residency requirement that does not contravene the Equal Protection Clause.

A. The Court is without jurisdiction under Article III of the Constitution to consider the Appellant's challenge to the durational residency requirement of the Camden hiring preference because the amendments to the Camden ordinance have eliminated the durational feature of the resident hiring preference and the issue is now moot.

As stated above in the Statement of the Case, the City Council of the City of Camden adopted an ordinance on June 23, 1983 which amended the ordinances which were considered by the Supreme Court of New Jersey in its decision of February 18, 1982. The June 23, 1983 ordinance superceded the prior ordinances adopted on August 14, 1980 and September 11, 1980 and changed the definition of a resident of the City of Camden to delete the requirement that an individual be domiciled in the City for twelve months prior to an application for employment on a City construction project in order to qualify for an employment preference as a City resident (A38). The amended ordinance defines a resident of the City as "any person who resides in the City of Camden." This change renders the appellant's challenge to the durational residency requirement moot, deprives the Court of jurisdiction under Article III of the Constitution, and requires the dismissal of this portion of the appeal.

The judicial power of the Courts of the United States under Article III of the Constitution extends only to "cases or controversies." The federal courts may act only if the "case or controversy" is "justiciable", *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969), and the controversy must be live at the time the Court reviews the case. *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975). If a case is moot, the Court lacks jurisdiction under Article III to review the case. *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972).

The constitutionality of the Camden ordinance must be reviewed "as it now stands, not at it once did." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Changes in a challenged provision of law which eliminate the features complained of will moot the controversy. In *Hall* v. *Beals*, *supra*, the appellants challenged a six month residency requirement for voting in a presidential election as prescribed by Colorado law. The Colorado Legislature reduced the residency requirement to two months. Since the appellants would have qualified to vote if the two month requirement had been in place at the time of the election, the case "lost its character as a present, live controversy that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Id.* at 48. So too here, appellant's challenge to the durational residency requirement of the Camden ordinance no longer represents a present, live controversy and the appeal on that issue should be dismissed.

The decisions in *Sosna* v. *Iowa*, *supra*, and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), do not militate against dismissal of the portion of the appeal challenging the durational residency requirement in the 1980 Camden ordinances. In both cases, durational residency requirements were challenged by individuals as representatives of a

class of persons. By the time their cases reached the Court, the named plaintiffs in *Dunn* and *Sosna* had satisfied the challenged durational residency requirements by residing in their respective states for the prescribed periods. Although the cases were moot as to the named plaintiffs, the issues remained alive as to the other members of the class. Therefore, the controversy was one which was "capable of repetition, yet evading review." *Dunn* v. *Blumstein, supra* at 333, n. 2, quoting from *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1919).

Unlike *Dunn* and *Sosna,* in the matter at bar there as been an intervening change in the law which has eliminated the provision challenged. Dismissal is not required because any members of unions which form the Council have now met the twelve month durational residency requirement, but rather because the twelve month durational residency requirement has been eliminated by adoption of an amendatory ordinance. Furthermore this is not a continuing controversy likely to recur in the future. The amendatory action of the Camden City Council renders the appeal on this issue moot, and requires dismissal. *Hall* v. *Beals, supra.*

B. The Camden ordinance, as amended, establishes a bona fide residency requirement that does not contravene the Equal Protection Clause.

This Court, in *Martinez* v. *Bynum, supra,* held that the State of Texas had not violated the Equal Protection Clause by restricting attendance in free public schools to bona fide residents. The Court reaffirmed the well established distinction between a bona fide residency requirement and a durational residency requirement. *See Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 255

(1974), and *Shapiro* v. *Thompson*, 394 U.S. 618, 636 (1969). A bona fide residency requirement, properly defined and uniformly applied, does not implicate the constitutional right of interstate travel because "any person is free to move to a State and establish residency there." *Id.*, 103 S.Ct. at 1842-1843. So long as the bona fide residency requirement does not deny nonresidents a fundamental right under the Constitution, the question "is simply whether there is a rational basis for it." *Id.*, n. 7.

The Camden ordinance as amended clearly establishes a bona fide residency requirement for enjoyment of a hiring preference on the City's construction projects. A bona fide residency requirement may include two criteria: an individual must live in the jurisdiction, and the individual must have a bona fide intention to remain there. *Martinez* v. *Bynum, supra,* 103 S.Ct. at 1844. Under the Camden ordinance, an individual need *only* demonstrate that he or she resides in the City of Camden. Clearly, the definition for residency in the Camden ordinance meets the test of *Martinez* v. *Bynum, supra,* as a properly defined bona fide residency requirement.

Since the bona fide residency in the Camden ordinance requirement does not deny to those who are not residents of the City any fundamental right guaranteed by the Constitution, it need only be shown that requirement has a rational basis. Workers on the City's construction projects are, for all practical purposes, "working for the City," *White* v. *Massachusetts Council of Construction Employees, supra,* 103 S.Ct. at 1046, n. 7, and it is well established that there is no fundamental constitutional right to government employment. In *Massachusetts* v. *Murgia, supra,* the Court stated:

> This Court's decisions give no support to the proposition that a right of governmental employment

> *per se* is fundamental. . . . Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availablity of employment opportunities." [*Id.* at 313, quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)]

The *Murgia* Court reaffirmed the principle that legislation affecting availability of employment opportunities need not be subject to strict scrutiny, and that heightened scrutiny was not required simply because employment opportunities involved governmental employment. Whether viewed as a right to seek employment generally, or the right to seek employment on a governmental sponsored public works project, the right is not fundamental for purposes of the Equal Protection Clause.

There is clearly a substantial interest on the part of the City of Camden in assuring that at least *some* of the employment opportunities available on the City's construction projects are enjoyed by residents of the City. Standing alone, this is a rational basis for limiting enjoyment of the proportional hiring preference to City residents. *Martinez* v. *Bynum, supra.* Moreover, as the Supreme Court of New Jersey stated in its opinion below, there are further independent justifications for a hiring preference favoring local residents on local public works contracts in the City of Camden. The City of Camden is one of the older urban centers of New Jersey. Over the last three decades its industrial and commercial values have declined, with the resulting adverse impact upon employment opportunities. The unemployment rate in the City generally averages two or three times the national rate. *Camden* v. *Skokowski,* 88 N.J. 304, 305, 441 A.2d 741, 742 (1982). According to the June 23, 1983 ordinance, unemployment in Camden at

that time was 19.1% as reported by the New Jersey Department of Labor.

The City of Camden is also a City with a substantial minority population. Members of recognized minority groups represent between 75% and 90% of the City's population. According to the 1980 United States Census Bureau statistics, approximately 53% of the City's residents are Black Americans, and about 20% are Hispanic Americans. In its June 23, 1983 ordinance, the City Council again noted that as of the end of 1977, unemployment among Black Americans in the State of New Jersey was 18.4% and among Hispanic Americans was 15.6%. The Council noted that these figures had increased significantly since the end of 1977.

As the Supreme Court of New Jersey stated in its opinion below, the pressing need for economic revitalization and the severe unemployment confronting the population of Camden demonstrate the rationality of the City's resident hiring preference. It is certainly not irrational for the City to presume that a hiring preference for the City's residents will help alleviate the unemployment problem in the City. What is more, the hiring preference for residents was adopted by Camden as part of the Camden affirmative action program, and the hiring preference was simply another means towards fostering participation by the large minority population of Camden in the work force on the City's construction projects. The Supreme Court of New Jersey expressly held that because members of minority groups represented between 75% and 90% of the Camden population, the obligation to make efforts to utilize City residents as employees on the City's public work projects would increase the likelihood that the City's contractors would meet the City and the State's minority hiring goals (A12). In

addition, the resident hiring preference will supply an incentive for better performance and advance the economy of the City (A27 to A28).

These are not illegitimate goals. It is true, as the Council states, that the problem of unemployment is of national scope (Appellant's Brief at 62). However, the Council ignores the acuteness of the problem in a place such as Camden which has experienced three decades of economic decline, and which has an extensive minority population among which unemployment is unusually severe. It is certainly rational for the City of Camden to adopt a bona fide residency requirement for a hiring preference on its construction projects as a means to reduce its severe unemployment, provide a measure of economic revitalization, and to further the goal of increasing participation by its large minority population in the City's public works construction. Clearly, the bona fide residency requirement does not violate the Equal Protection Clause.

C. In the event that the Court does not dismiss the appellant's constitutional challenge to the durational residency requirement in the 1980 Camden ordinances, the Court should conclude that the requirement was not violative of the Equal Protection Clause because it did not penalize the exercise of the right of interstate travel and is rationally related to legitimate governmental interests.

In *Shapiro* v. *Thompson, supra,* the Court held that a State statute which denied welfare assistance to individuals who had not resided in the State for one year preceding their application for assistance violates the Equal Protection Clause. The durational residency requirement was viewed as penalizing those who exercised their right to travel, and therefore could be upheld only if it served a compelling governmental interest. Not-

withstanding its holding, the Court made clear that it was not establishing a rule that *all* durational residency requirements were invalid. Not all durational residency requirements penalize the exercise of the right of interstate travel. Even those that do may nevertheless not violate the Equal Protection Clause if they are justified by compelling governmental interests. *Id.*, 398 U.S. at 638, n. 21.

The Court's decisions in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital* v. *Maricopa County*, *supra*, further explained that a classification will be held to penalize persons who have exercised their right to interstate migration if the classification involves the denial of a fundamental right, *Dunn* v. *Blumstein*, *supra* (Durational residency requirement impaired the exercise of the fundamental right to vote), or involves the denial of a basic necessity of life. *Memorial Hospital* v. *Maricopa County*, *supra* (Durational residency requirement impaired ability to secure emergency medical care). The Court emphasized that the rule was limited to basic necessities of life because "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.*, at 260. Indeed, the Court noted that it had upheld statutes requiring one year of state residence as a condition to preferential tuition rates at state institutions of higher education. *See Starns* v. *Malkerson*, 326 F.Supp. 234, 238 (D.Minn. 1970) (three judge court), aff'd 401 U.S. 985 (1971). In the Court's view, the tuition cases had correctly concluded that a basic necessity of life involved only food, clothing and shelter and the immediate and pressing need for preservation of life and health. *Id.* 415 U.S. at 260, n. 15, quoting from *Kirk* v. *Board of Regents*, 273 Cal. App.2d 430, 440, 78 Cal. Rptr. 260, 266-267 (1969), app. dism. 396 U.S. 554 (1970).

In *Sosna* v. *Iowa*, 419 U.S. 408 (1975), the Court rejected an equal protection challenge to an Iowa law which imposed a one year durational residency requirement as a condition to instituting an action for divorce. The Court held that the waiting period requirement did not irretrievably foreclose the appellant from

> . . . obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*. She would eventually qualify for the same sort of adjudication which she demanded upon her arrival in the state [*Id* at 407].

The Court also emphasized the significant State interests involved in the waiting period requirement. The regulation involved the area of family relations "an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 404. The consequences of a divorce decree are such that the state could insist upon a modicum of attachment to the State. Moreover, a waiting period served as a means for Iowa to ensure that its divorce decrees are insulated from the likelihood of collateral attack in other states by establishing a nexus justifying the exercise of state court jurisdiction to determine the legal relationship of the parties. *Id.* at 407.

The durational residency requirement that was once a feature of the Camden ordinance does not warrant strict scrutiny under the test set forth in *Shapiro* v. *Thompson, supra.* The durational residency requirement does not penalize those who have exercised the right of interstate travel by denying either a right deemed fundamental or by impairing access to a basic necessity of life. As argued above, there is no fundamental right to seek employment on all rather than some of the Cam-

den public construction projects. *Supra* at 13-14. The ability to seek employment on all rather than a proportional amount of the available positions does not deny a basic necessity of life which is critical for the preservation of life and health. As explained in *Kirk* v. *Board of Regents, supra,* cited with approval in *Memorial Hospital, supra*:

> . . . The residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not [involve] similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.

Similarly, in this matter the durational residency requirement does not preclude individuals who have resided in the City for less than a year from seeking employment in construction work which is not undertaken for or on behalf of the City. There is no showing in this matter that new residents in Camden were shut out from all employment opportunities in the construction field in Camden during the period when the durational residency requirement was in effect. Moreover, by its terms, the durational residency requirement, like the resident hiring preference, applied only to 40% of the available positions on the Camden projects and newly arrived residents were free to seek employment on the remaining 60% of the available jobs.*

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* These limitations are not without significance. The record in this case does not disclose whether any of the Council's members were disadvantaged in any way by the durational residency requirement. It may very well be true that no individual member of any labor organization represented by the Council was denied employment on a Camden City construction project by reason of the durational residency requirement challenged in this case.

It is clear therefore that the durational residency requirement in the Camden ordinance need not be "shown to promote a compelling governmental interest." *Shapiro* v. *Thompson, supra* at 634. Rationality is sufficient to meet the equal protection challenge, and there was a clearly rational basis for the City to have adopted a one-year durational residency requirement as a condition for enjoyment of the resident hiring preference. It is important to emphasize that the durational residency requirement relates to the City's own construction contracts, contractual arrangements which are infused with the State's proprietary interest. A durational residency requirement as a condition to enjoying a hiring preference furthers a substantial interest on the part of the City because those who qualify for the preference will have demonstrated a clear commitment to the City by residing there a year or more. This commitment will be an incentive for better performance as a worker on the City's projects.

In addition, the Camden resident hiring preference was adopted with a view toward reducing the severe unemployment of those who reside in Camden. The unemployment problem is not new to a declining urban area such as Camden which has experienced economic decline over the last three decades. It is fair to say that the high unemployment rates reflect the joblessness of many who have resided in Camden over the years and who lack the wherewithall to travel to other places where employment opportunities are greater. Given the rate of joblessness in Camden generally, it is fair to assume that the ranks of the City's unemployed include large numbers of people who have recently come to Camden seeking job opportunities.*

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* It is important to note that in 1980 when the City adopted the durational residency requirement, unemployment in the City was 11.5% (A36). As of June of 1983, when the City Council amended its ordinance, the unemployment rate in the City had risen to 19.1%.

It is therefore reasonable for the City to assume that its unemployment problem is one that primarily effects its long-term residents. It is rational for the City to establish a limited hiring preference with a durational residency requirement of a year because if all of the job opportunities are taken by residents new to the City, who have come solely for the purpose of working on the City projects, there will be little prospect of lessening the severe unemployment situation in the City. Clearly, it is not irrational for the City of Camden to take this limited step in endeavoring to provide its long-term citizens with a small part of the benefits that flow from City-sponsored construction projects. The City's durational residency requirement was rationally based and, therefore, did not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of New Jersey that the Camden resident hiring preference did not violate the Privileges and Immunities Clause should be affirmed. That portion of the appeal relating to the durational residency requirement should be dismissed as moot, or if not dismissed, the Court should conclude that the durational residency requirement as well as the bona fide residency requirement in the hiring preference do not contravene the Equal Protection Clause.

Respectfully submitted,

IRWIN I. KIMMELMAN.
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey.

Dated: July 25, 1983

No. 81-2110

Office - Supreme Court, U.S.
FILED
NOV 18 1983
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN AND THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from the Supreme Court of New Jersey

Steven K. Kudatzky
James Katz
Hilary B. Klein
TOMAR, PARKS, SELIGER, SIMONOFF and ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000

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PRELIMINARY STATEMENT

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as "the Council"), seeks review of a judgment of the Supreme Court of New Jersey, reported at 88 N.J. 317, 443 A.2d 148 (1982), which upheld the constitutionality of a resident preference ordinance enacted by the City of Camden, New Jersey. The ordinance required that at least forty per cent of the private employees hired by contractors and sub-contractors engaged in public works construction projects be municipal residents for one year prior to employment. Probable jurisdiction was noted by this Court on March 7, 1983, ____ U.S.____, 103 S. Ct. 1270 (1983).

Recognizing the constitutional infirmity of its enactment, Camden amended its

ordinance in June, 1983, two weeks after appellant filed its brief on the merits in this matter.[1] Although the amended ordinance eliminated the durational residency requirement, it retained the constitutionally repugnant aspect of the ordinance which strikes at the core objective of the Privileges and Immunities Clause to protect out-of-state residents' right to pursue their lawful trades, by continuing to exclude all out-of-state residents from competing for forty per cent of the private jobs offered on public works construction projects.

TERMS OF THE AMENDED ORDINANCE

The amended ordinance provides in pertinent part that "[f]or any 'construction contract' in excess of $50,000.00...40% of the work hours shall be furnished by City

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[1]Appendix to City's Brief at A1-A19 (referred hereafter as "City's App," followed by the page number). "A" followed by the page number, refers to the Appendix

residents." (Sect. 4, §4.1B).[2] This requirement applies "to each and every trade, craft or skill employed to perform the construction contract and shall be reflected throughout the various levels of employment within each trade, craft or skill [and]...in no event shall the total work hours furnished by...City residents be less than the goals established in paragraph 4.1." (Sect. 4, §4.2).[3] For purposes of complying with the ordinance, "total work hours" includes "the number of hours devoted to all tasks customarily performed on a construction site whether or not such tasks are, in fact, performed on the construction site."[4] The ordinance

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attached to appellant's Jurisdictional Statement.

[2]City's App. A-8.

[3]Id.

[4]Id.

encompasses "[a]ny agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant."[5] The term "Resident of the City of Camden" is defined as any person who resides in the City of Camden.[6]

The requirements of the ordinance also apply to sub-contractors and unions. Thus, the ordinance requires a developer/contractor to submit copies of the ordinance to all sub-contractors and "make compliance with it, a specification of all bids." (Sect. 6, §6.1):[7] "Each developer/contractor

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[5]City's App. A-4.

[6]City's App. A-5.

[7]City's App. A-9.

shall be responsible for the performance of its sub-contractors in the implementation of the provisions of the ordinance... [W]henever a developer/contractor sub-contracts a portion of the work on a project, the sub-contractor shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he/she were the developer/contractor." (Section 12, §12.1).[8] Whenever a developer/contractor has a referral agreement with a union, the union is obligated to sign a statement to be submitted by a developer/contractor with its bid, indicating the union's awareness of the terms, conditions and goals of the ordinance and the union's commitment to assist the developer/contractor and/or sub-

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[8]City's App. A-18.

contractor to comply with the requirements of the ordinance.[9] A contract will not be awarded and therefore work and referrals will not be available to union members, absent "an acceptable union statement" or adequate explanation for an inability to obtain one.[10]

Taken together, as in the original ordinance, these provisions exclude out-of-state workers from forty per cent of all jobs in a major segment of the construction industry in Camden and mandate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions solely on the basis of an applicant's state of residency, regardless of the individual's unemployment

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[9]City's App. A-17.

[10]City's App. A-18.

status and qualifications. The forty per cent mandate is a minimum requirement and under the terms of the ordinance may permissibly be higher. Thus, an out-of-state resident is excluded from access to a significant segment of private sector employment opportunities regardless of whether he or she is unemployed, a minority, or possesses more skills for the requisite job.

In addition to private contractors, the ordinance applies to the hiring decisions of sub-contractors and to referrals from union hiring halls, despite the fact that neither sub-contractors nor unions have any connection with the City of Camden. The affected individuals are all private employees, whose only connection with the municipality is the location of the job site. The ordinance regulates both the primary relationship between the City

and its public works contractors, as well as the secondary, wholly private relationships between contractors and subcontractors and their employees. The terms of the ordinance encompass all work customarily performed on a construction site, regardless of the location that such tasks are actually completed. The provisions of the ordinance apply to any projects, funded in whole or in part by the City of Camden, or in which the City merely expends or administers the funds, including both public and private projects, as well as (by the City's own admission) to projects using monies obtained through federal grants.[11]

The Camden ordinance represents governmental intrusion into the contractual relationship between private parties, in order to carry out a purpose which is

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[11]City's brief at 5 n.9. Indeed, the ordinance has been applied to federal money obtained to help finance the construction of a nursing home and will be applied to a

plainly protectionist of local economic interests. The City is choosing which persons, among the class of construction workers comprised of both residents and nonresidents, may compete for employment within a certain segment of the private construction industry. Camden, authorized by the State of New Jersey, is seeking to accomplish what the state cannot--the exclusion of out-of-state residents from a significant portion of private employment opportunities.[12]

ARGUMENT

I. APPELLANT'S CHALLENGE TO THE CAMDEN ORDINANCE, WHICH EXCLUDES OUT-OF-STATE RESIDENTS FROM ACCESS TO FORTY PER CENT OF THE JOBS WITH PRIVATE EMPLOYERS ON PUBLIC WORKS CONSTRUCTION PROJECTS,

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transportation terminal financed primarily by the U.S. Department of Transportation and exclusively by non-city funds.

[12]The amended ordinance also includes a "good faith" requirement and eliminates the provision that the ordinance applies to

CONSTITUTES A "CASE OR CONTROVERSY" WHICH THIS COURT HAS JURISDICTION TO ADJUDICATE.

In order to prevent resolution of this controversy, the City in its brief on the merits contends for the first time that the appellant lacks standing, the matter is not ripe for resolution, and the case has been mooted by intervening amendments to the

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"construction of all residential housing of four units or more." (A 55). These changes are constitutionally insignificant, because they do not alter the infirmity of an enactment which excludes out-of-state workers from access to significant employment opportunities merely because of state of residence. Moreover, despite the good faith proviso, the ordinance gives an automatic preference to city residents which is denied to out-of-state residents, and both unions and their members must conform their conduct to the protectionist provisions of the ordinance. Finally, on its face, the ordinance applies to any funds, including federal money, which the City expends or administers (City's App. A-4). Thus, the ordinance still may encompass private residential construction, which is built in whole or in part by grants administered by the City.

ordinance.[13] Contrary to the City's claims, excluding out-of-state residents from access to forty per cent of the public works construction jobs in the City of Camden presents a live controversy, Powell v. McCormack, 395 U.S. 486, 496 (1969), brought by a party with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness ...upon which the court so largely depends..." Baker v. Carr, 369 U.S. 186, 204 (1962), and it constitutes a substantial matter of "sufficient immediacy and reality" to warrant the attention of this Court. Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 506 (1972); quoting, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

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[13]None of these issues were ever raised previously by the City, either before the New Jersey Appellate Division, New Jersey Supreme Court or in response to appellant's Jurisdictional Statement. In addition,

A. The Substitution of a Continuing Residency Requirement for the Camden Ordinance's Prior Durational Residency Requirement Does Not Moot Appellant's Privileges and Immunities Challenge, Because the City's Ordinance Continues to Exclude Out-Of-State Residents from Access to Forty Per Cent of the Jobs with Private Employers on Public Works Construction Projects within the City.

In its brief, appellee City of Camden contends that the instant case "has largely been mooted," because it changed the definition of residency in the ordinance during the summer of 1983. Formerly defined as a person who had resided in Camden for at least twelve months, a resident is now defined as any person who lives in the City of Camden. With the exception of this change, the ordinance essentially remains intact.

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neither the State nor amicus Department of Public Advocate asserts this position in their papers.

It is well settled that a case only becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982). See also United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980), quoting Powell v. McCormack, 395 U.S. 486, 496 (1968). The proponent of mootness has the heavy burden of persuasion. United States v. W.T. Grant, 345 U.S. 629, 633 (1953). Moreover, even if one issue is no longer in controversy, this Court on numerous occasions has recognized that the mooting of one issue does not moot an entire case: "Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." Powell, 395 U.S. at 497. Accord, University of Texas v. Camenisch,

451 U.S. 390, 394 (1981); United Public Workers v. Mitchell, 330 U.S. 75, 86-94 (1947).

In the instant case, appellant maintains its interest in the outcome of the controversy. At its core, the ordinance continues to discriminate against union members who are out-of-state residents, by restricting access to forty per cent of the employment opportunities on public works construction projects to Camden residents. The City still seeks to condition employment with private contractors solely on location of residency in Camden, and by thus regulating access to employment, it is regulating wholly private relationships in favor of parochial interests.

Appellant's central argument in this case, its Privileges and Immunities challenge, thus remains untouched by the substitution of a continuing residency

requirement for the durational residency requirement, because the entire focus of this argument rests on the ordinance's distinction between in-state and out-of-state residents. Because the Privileges and Immunities Clause issue is still in controversy, this case is not moot. See Powell, supra and Mitchell, supra. "This, then is simply another instance in which one issue on a case has become moot, but the case as a whole remains alive because other issues have not become moot." University of Texas v. Camenisch, supra. (citations omitted).[14]

Finally, the case of Hicklin v. Orbeck, 437 U.S. 518 (1978) is directly on point and should control this Court's analysis of the mootness question. In that case, appellants challenged on both

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[14]Indeed, in its brief, the City of Camden does not even attempt to claim that the entire controversy is moot, contending instead that this Court should dismiss this

Privileges and Immunities and Equal Protection grounds an Alaskan statute granting an employment preference for residents who had lived in the state for at least a year. Although the Equal Protection Clause issue was moot because the Alaska Court struck down the durational residency requirement under both the state and federal constitutions, this Court held that the entire case was not moot and determined that the residency preference violated the Privileges and Immunities Clause. Id. 523.

Analogously, the case sub judice is not moot, because the ordinance continues

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case allegedly because "a significant, indeed a predominant portion of the case has been mooted." (Appellee's brief at 16). Powell and Mitchell, however, dictate that this Court hear the remaining live issues, despite the City's assertions.

to foreclose out-of-state union members from obtaining access to forty per cent of the private employment opportunities on public works construction projects. Moreover, in Hicklin, as in the instant case, appellant's Privileges and Immunities argument focused on the law's distinction between in-state and out-of-state residents and thus remained unaffected by the mootness of the durational aspect of the challenged statute.

Therefore, appellant's Privileges and Immunities challenge remains unaffected by Camden's amended enactment, because the City persists in its constitutionally repugnant practice of excluding out-of-state workers from access to employment opportunities.

B. There Is No Requirement that a Fact-Finding Hearing Be Held before the Case Is Ripe for Supreme Court Adjudication.

In its brief, appellee City of Camden contends that the absence of a trial-type

hearing in the state courts or before an administrative agency precludes the Supreme Court from reviewing this case. Contrary to appellee's assertions, however, this Court has never held that it can exercise its jurisdiction only if a fact-finding hearing were conducted in the state court.

Indeed, every time that it decides a case resolved in the lower courts on a summary judgment motion, a motion to dismiss for failure to state a claim or a motion for declaratory relief, this Court does not have access to a complete factual record.[15] In such cases, this Court issued rulings because the issues involved were primarily questions of law. Similarly, in the case at bar, the issue is whether Camden's resident preference violates the federal Constitution. Because appellant is

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[15]See, e.g., Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981); Retail Clerks International Ass'n Local 1625, AFL-CIO v. Schermerhorn, 373

challenging the constitutionality of the ordinance on its face,[16] the absence of a fact-finding hearing in the lower courts is not relevant. Moreover, the New Jersey Supreme Court decision was based on its threshold ruling that the Privileges and Immunities Clause does not apply to local enactments, regardless of the claims alleged (A26).

Furthermore, this Court on numerous occasions has recognized its power to hear federal constitutional claims challenged originally in state court, as long as

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U.S. 746 (1963); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941).

[16]The Supreme Court does examine the lower court record to determine whether expressly or by clear implication the appellant's federal claim was presented in the state system. See, e.g., Webb v. Webb, 451 U.S. 493 (1981); New York Ex Rel. Bryant v. Zimmerman, 278 U.S. 63. It is apparent from the record in this case, which includes the New Jersey Supreme Court opinion, that the state court's decision upholding the residency preference was based entirely on its interpretation of

appellants had exhausted state remedies,[17] and the state court decision was a final judgment rendered by the highest possible court of the state. See, e.g., Flynt v. Ohio, 451 U.S. 619 (1981); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Local No. 438 Construction and General Laborers' Union v. Curry, 371 U.S. 542, 549-551 (1963). The final judgment rule only precludes reviewability when anything further remains to be determined by a state court. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In the case sub judice, appellant has exhausted its state remedies by pursuing its case to the highest state court, which rendered a final judgment. Established jurisdictional

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federal rather than state constitutional principles.

[17]Appellant, both before the New Jersey courts as well as before this Court, is seeking judicial review of an administrative decision by the State Treasurer's office to approve Camden's resident pre-

principles dictate that this case is ripe

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ference ordinance. Appellant initiated review of the State Treasurer's approval by filing a Notice of Appeal in the Appellate Division of the Superior Court of New Jersey, which pursuant to New Jersey Court Rule 2:2-3(a)(2) has exclusive jurisdiction to review final decisions or actions of any state administrative agency. See, e.g., Pascucci v. Vagott, 71 N.J. 40, 53 (1976) (and cases cited therein). This matter was subsequently certified by the New Jersey Supreme Court upon its motion pursuant to New Jersey Court Rule 2:12-1.

Thus, appellant has challenged the state administrative approval of the City's ordinance through the precise procedure mandated by New Jersey's Court Rules. The City makes no claim that the challenged state action either does not constitute a final order or that appellant deliberately bypassed any readily available fact-finding forum. Moreover, it is particularly outrageous for the City to object to the lack of a trial type hearing when the City ordinance was approved by the State of New Jersey pursuant to a "closed-door" administrative process which offered no realistic or statutorily mandated opportunity for notice, comment or hearing. Other than the exchange of correspondence and the submission of the ordinance, there were no administrative proceedings prior to the approval of the ordinance. The City's most recent amendments, enacted in June 1983, were approved in a similar fashion.

for review by this Court.

The case of Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429 (1952), upon which the City of Camden relies, is inapposite. In Doremus, the Court held that appellant taxpayers did not have standing to challenge the validity of a state statute providing for the reading in school without comment of five verses of the Old Testament, because these taxpayers had not shown any nexus between their taxpayer standing and the challenged conduct.[18] In contrast, the Council is facially challenging a state administrative agency's final action, which precludes appellant's members from access to private employment opportunities. No trial-type hearing is necessary to demonstrate the protectionist nature of the Camden enactment. Moreover,

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[18]Since 1952, this Court has cited Doremus only for the proposition that the federal courts, because of the dictates of the Article III "case or controversy"

the City does not question the fact that the ordinance is presently in operation, thus requiring both out-of-state residents and local unions to conform their conduct to its dictates. According to the City's own statements, the ordinance has impacted favorably upon City residents, by definition thereby adversely effecting out-of-state residents.

Furthermore, unions are not required to wait until their members have actually lost jobs to challenge the City's resident preference. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is

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requirement, are not bound by state court assessments of the parties' standing in a given case. See State of New Jersey v. Portash, 440 U.S. 450 471 (1979) (Blackmun, J. dissenting); Burns v. Ohio, 360 U.S. 252, 259-260 (1959)(Frankfurter, J., dissenting).

certainly pending that is enough." Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923); see Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979) (and cases cited therein); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). The dispute is neither hypothetical or abstract, but represents a substantial controversy between parties of adverse legal interests ripe for review by this Court.[19]

A decision to the contrary would mean that appellant would have no remaining forum to challenge the Camden ordinance. If this Court dismisses this case because of lack of a factual record or because it is not ripe, neither appellant nor appellee would ever have any further opportunity to develop a record in state court or seek

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[19]Courts have found matters ripe for adjudication in far more speculative circumstances than those involved herein. See, e.g., Babbitt v. United Farm Workers,

further review of the State's action. Such a result would pose an undue hardship on the appellant and would demonstrate that by adopting novel procedures, the state court would ensure that it could insulate its decisions on federal constitutional issues from review.[20]

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supra., 442 U.S. at 299 (failure to invoke Act's election procedure in the past and no stated interest to do so in the future); Epperson v. Arkansas, 393 U.S. 97, 101-102 (1968) (no record of any prosecution in 40 years under the anti-evolution law); Railroad Transfer Service, Inc. v. City of Chicago, 386 U.S. 351 (1967); Brown v. Anderson, 202 F.Supp. 96, 99-100 (D. Alas. 1962) (challenge to Alaskan statute excluding non-residents from fishing in certain areas presented justiciable controversy even though the Act had not yet been applied). Unlike International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954), in which the parties were seeking a declaratory judgement on the constitutionality of a particular statute prior to the conduct having occurred and the challenged construction having been adopted by the federal agency, in the case at bar, the Camden resident preference is already operational and its impact is already being felt.

[20]As the Court stressed some fifty years ago in Nashville, Chattanooga, and St. Louis Railway v. Wallace, 288 U.S. 249

Contrary to appellee's claim, the Camden resident preference is appropriate for adjudication by this Court, and denial of judicial review will impose unwarranted hardship on the appellant.

(1933), satisfying Article III requires concern "not with form, but with substance." Id. 259. Justice Stone concluded that the form or method of procedure by which federal rights are adjudicated in the state courts cannot preclude Supreme Court review so long as the Article III "case or controversy requirement" is met. Id. 264. See also, NAACP v. Alabama, 357 U.S. 449, 457-458 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those, who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.") Indeed, to restrict appellate review because of the state's purported adoption of novel procedures would undermine this Court's statutorily mandated exercise of jurisdiction to review a state court's decision upholding a state enactment in the face of federal constitutional challenges. 28 U S.C. §1257(2). In the alternative, such a result would mean that this Court would have the power to dictate procedural rules to the state courts.

C. Appellant Has the Requisite Standing to Challenge Camden's Resident Preference Ordinance.

Camden also contends that the appellant lacks the requisite standing to challenge its resident preference, in that there is no evidence of a distinct and palpable injury suffered or immediately threatened which is fairly traceable to the challenged conduct (City's brief at 18). In so contending, the City has misconstrued both appellant's claim and the nature of the injury sustained.

The fundamental focus of the standing inquiry is whether the parties seeking to invoke the Court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v.

Carr, supra, 369 U.S. at 204 (1962). Subsequent decisions of this Court have required the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and a "'fairly traceable' causal connection between the claimed injury and the challenged conduct." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978) (citations omitted).

Moreover, the standing requirement is not concerned with the degree of injury but rather with the distinction between some injury and none at all. Valley Forge Christian College v. Americans United for Separation of Church and State, supra, 454 U.S. 464, 497 (1982) (Brennan, J.,

dissenting) (citations omitted).

By claiming that appellant lacks standing because it has failed to demonstrate that any out-of-state resident has lost a job, Camden has completely misconstrued the nature of the alleged harm. The gravamen of appellant's claim is that the ordinance on its face discriminates against and thus injures out-of-state residents by denying them access to forty per cent of the private employment jobs on public works construction projects.[21] Moreover, the ordinance imposes specific requirements on the operation of union hiring halls, which contravene existing collective bargaining agreements and subject the noncomplying union to potential liability. Furthermore, hiring halls must sign a statement complying with the ordi-

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[21] See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 280 n.14 (1978) (inability to compete for all one hundred places in medical class constitutes

nance and conform their behavior to the terms of the enactment at the peril of union contractors being precluded from bidding on existing construction projects and union hiring halls being denied referral opportunities which were previously available.

Appellant need not show loss of a job in order to have standing. Rather, as this Court has stressed:

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement...But [o]ne does not have to await consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough...(citations omitted).

Babbitt v. United Farm Workers, supra, 442 U.S. at 298.[22] Here, the City of Camden by

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demonstrated injury, regardless of inability to prove admission in the absence of the special program).

[22]Moreover, in this case at least three

the very terms of its ordinance is seeking to promote the welfare of Camden residents, by restricting job opportunities available to out-of-state workers. It is legal sophistry for Camden to enact a protectionist measure to promote jobs for purportedly unemployed city residents at the expense of out-of-state workers and then to argue subsequently that such out-of-state

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factors indicate that the mere threat of loss of a job is sufficient. First, this is a highly specific ordinance clearly directed at out-of-state residents. See Doe v. Bolton, 410 U.S. 179, 187-189 (1973). Second, the Camden ordinance is a recent enactment which the City is presently enforcing and not a law which has lain moribund for years. See Poe v. Ullman, 367 U.S. 497, 501 (1961). Third, because this is a civil rather than criminal statute, it imposes an affirmative duty to comply. "[I]f appell[ants] are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion." Lake Carriers Ass'n v. MacMullan, supra, 406 U.S. at 507 (citation omitted).

residents are wholly unaffected by Camden's resident preference.[23]

Surely, the drafter of the Privileges and Immunities Clause, which "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation..." Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871), intended that the beneficiaries of their legacy should be able to enforce their protected rights in the courts of

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[23]It should be emphasized that the Council, an unincorporated association, is not a a legal entity apart from its members, see Harker v. McKissock, 12 N.J. 310, 96 A.2d 660 (1953). Moreover, this Court has recognized that an association may initiate litigation as the representative of its members, as long as it alleges that one or more of its members is suffering immediate or threatened injury as a result of the challenged action. See, e.g., Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342 (1977); Warth v. Seldin, 422 U.S. at 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739 (1972); National Motor Freight Ass'n v. United

this nation.[24] Standing should not be denied "'to the class for whose sake the constitutional protection is given,'" Jones v. United States, 362 U.S. 257, 261 (1960), quoting New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907).

II. THE CAMDEN ORDINANCE, WHICH DISCRIMINATES AGAINST OUT-OF-STATE RESIDENTS BY DENYING THEM ACCESS TO A SIGNIFICANT SEGMENT OF PRIVATE EMPLOYMENT OPPORTUNITIES SOLELY BECAUSE OF THEIR STATE OF RESIDENCE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Camden Resident Preference Is Not Immune From Review under the Privileges and Immunities Clause Because it Is Enacted by a Municipality Rather Than the State.

States, 372 U.S. 246, 247 (1963); NAACP v. Alabama, 357 U.S. 449, 459 (1958). See also Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98, 275 A.2d 433 (1971), in which the New Jersey Supreme Court also recognized an associations's power to initiate litigation to vindicate the rights of its members.

[24]Indeed, this Court has found standing in cases alleging an injury which is far less distinct and palpable than what has

Consistent with the clear purpose and objectives of the Privileges and Immunities Clause, "it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of

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occurred herein. See, e.g., Bryant v. Yellen, 447 U.S. 352 (1980) (no evidence that individuals would be able to purchase excess lands if statutory provision were applicable); Duke Power Co. v. Carolina Enviromental Study Group, Inc., supra (standing found even though appellants showed only potential environmental and aesthetic consequences resulting from the construction of nuclear power plants); Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977) (standing found even though developer's project was contingent on ability to procure rezoning, obtain financing and qualify for federal subsidies); Doe v. Bolton, supra, 410 U.S. at 188 (no evidence doctors were prosecuted or threatened with prosecution for violating the State's abortion statute); Jenkins v. McKeithen, 395 U.S. 411 (1969) (plaintiff had standing to attack constitutionality of Labor-Management Commission of Inquiry, even though plaintiff did not allege that he had been or would be called before the Commission).

doing business in State B on terms of substantial equality with the citizens of that State." Toomer v Witsell, 334 U.S. 385, 396 (1948) (footnote omitted). Although the contours of the Privileges and Immunities Clause have not been fully developed, Baldwin v Fish and Game Commission of Montana, 436 U.S. 371, 380 (1978), this Court has consistently held "violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." Hicklin v Orbeck, 437 U.S. 518, 524 (1978).

Although the Camden resident preference contravenes the promises of interstate equality and non-discrimination which are at the core of the Privileges and Immunities Clause, the New Jersey Supreme Court held, and the appellees contend

(State brief at 21-26) that the Clause does not apply to municipal enactments, such as the Camden ordinance, which "most certainly affect more New Jersey residents not living in Camden than it does out-of-state residents." (A26) Such an approach completely immunizes municipal conduct from Privileges and Immunities Clause scrutiny and effectively nullifies the protection offered out-of-state residents from nondiscriminatory treatment.

Contrary to the New Jersey Supreme Court's unsubstantiated claim, far more out-of-state residents are prejudiced by the Camden enactment than New Jersey citizens. Thus, according to the latest census data, approximately four out of five residents excluded by Camden's ordinance are out-of-state residents.[25] The impact and

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[25]In the SMSA of which Camden is a part, there are 4,716,818 people, of which 3,682,709 are Pennsylvania residents, and 1,034,109 are New Jersey residents.

effect of the Camden ordinance falls primarily on out-of-state residents, who are discriminated against for no other reason "beyond the mere fact that they are citizens of other States." Toomer v Witsell, supra, 334 U.S. at 396.

Moreover, there is nothing in the identity of a municipality, as distinct from a state, which should render its governmental actions any the less subject to federal constitutional protection against invidious discrimination.[26] The pur-

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Excluding the 84,910 Camden residents who receive the benefit of residential preference, 3,682,709 of the 4,631,908 residents who are excluded, or approximately 80 per cent, live outside the State of New Jersey. The exclusionary impact of the ordinance is exacerbated by the fact that, Philadelphia, Pennsylvania, which is the fourth largest city in the country with a population of 1,878,326, is immediately adjacent to Camden. Source: U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING AND POPULATION.

[26]What this Court has stressed regarding the protections afforded by the Equal Protection Clause of the Fourteenth Amendment applies with equal force to the

poses of the Privileges and Immunities Clause are no less implicated when the discrimination against out-of-state residents is effectuated by means of a municipal ordinance, rather than a state statute.[27] Furthermore, the exclusion effectuated against all non-New Jersey

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Privileges and Immunities Clause, which secures equal protection of the laws for out-of-state residents.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. 'Thus the prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the state taking the action ...' A city, town or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. (citation omitted)

Avery v. Midland County, 390 U.S. 474, 480-481(1968).

[27]Out-of-state residents suffer from the same lack of political access to municipal decisionmaking as they do state government. The absence of political accountability has

residents by the Camden ordinance is not ameliorated or eliminated by the fact that other New Jersey citizens who are not residents of Camden are similarly victimized.

Ironically, both this Court and numerous lower courts have recognized that a state may not limit out-of-state residents' access to private employment opportunities.[28] To hold that city enactments are immune from Privileges and

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long been held held as an important consideration justifying the heightened scrutiny afforded by the Privileges and Immunities Clause. Varat, State "Citizenship" and Interstate Equality, 48 UNIV. OF CHI.L.REV. 487, 517-518 (1981) Since nonresidents are unrepresented in the legislature of the State imposing the exclusion, judicial acquiescence in schemes imposing special burdens upon out-of-state residents would compel them to seek redress through their own state, "but to prevent [retaliation] has one of the chief ends sought to be accomplished by the adoption of the Constitution." Austin v. New Hampshire, 420 U.S. 656, 662-663 (1975) (citation omitted).

[28] See, e.g., Hicklin v. Orbeck, supra; Mullaney v. Anderson, supra; Toomer v. Witsell, supra; Ward v. Maryland, supra. Appellee's reliance on Woodruff v. Parham,

Immunities Clause scrutiny and thereby permit Camden to deny access to all out-of-state residents from a significant portion of private employment opportunities grants the City greater constitutional power than has its parent, the State.[29]

Such a holding not only enables a state to induce indirectly what it cannot command directly, but also encourages every municipality in New Jersey to accomplish that which the state cannot-achievement of an insulated and isolated economic system under which residents of each city in New

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8 Wall 123 (1862) is misplaced. That case involved an objection to a tax on imports from other states. However, that was a uniform tax imposed by the State of Alabama on all sales made within it, whether by citizens of Alabama or citizens of another state. By contrast, in the case sub judice, the Camden ordinance excludes all out-of-state residents, while according an employment preference to all Camden, New Jersey residents.

29 This would occur even though "[o]urs is a 'dual system of government', ...which has no place for sovereign cities." Community Communications Company, Inc. v. City of

Jersey can work in their own city and inhabitants of Delaware and Pennsylvania can work nowhere in New Jersey.[30] The one nation which the Privileges and Immunities clause was designed to create out of "a collection of independent, sovereign" States, Toomer v. Witsell, supra, 334 U.S. at 395, could be just as easily destroyed by independent

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Boulder, 455 U.S. 40, 53 (1982) (citation omitted). As this Court stated long ago.

> All sovereign power 'within the geographical limits of United States' resides either with 'the government of the United States, or [with] the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.' (emphasis in original) (citation omitted).

Id. 53-54. Cf., Lincoln County v. Luning, 133 U.S. 529 (1890) (Eleventh Amendment immunity does not extend to state's political subdivision).

[30] Nor is such a possibility either hypothetical or speculative. In 1983 alone, three other governmental entities in New Jersey (Mercer County, Hamilton Township and

municipalities acting to further their own parochial interests as by independent sovereign states.[31]

Rather than encouraging economic welfare, the Camden resident hiring perference will merely foster internecine economic warfare, resulting in the kind of balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal.[32] When a classification

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Atlantic City) have adopted resident preference ordinances on construction projects. (See Appendix A for text). On October 31, 1983, the Atlantic City Mayor vetoed the city's ordinance, stressing in part that action should await the outcome of the case sub judice.

[31]Indeed, the specter of municipalities being "free to make economic choices counseled solely by their own parochial interests," City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 408 (1978) and "the serious economic dislocation which could result" Id. 413, has prompted this Court to hold that city enactments are not "state action" immune for review under federal antitrust law. Id; Community Communications Company, Inc. v. City of Boulder, supra.

[32]The degree of retaliation and economic war-

utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privileges and Immunities Clause, and should not, as the New Jersey Supreme Court held and appellees contend, be exempt from constitutional review merely because some in-state residents are also disadvantaged.

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fare feared by the Framers is fast being realized, as resident hiring preferences imposed upon private contractors are beginning to proliferate. At least twenty-four states presently have some such provision in effect, while four state statutes have been struck down. Maryland has enacted an openly retaliatory measure, which prohibits public works construction employment for any resident of a state whose laws prohibit the employment of Maryland residents. Md.Ann. Code, Art. 21, §8-503 (1981). Note, Construction Worker Residency Requirements: A Constitutional Response, 17 NEW ENG. L.REV. 461 n.3 (1982).

B. The Fact That Camden's Exclusion of Out-of-State Residents from Access to Employment Opportunities May Not Violate the Dormant Commerce Clause Does Not Immunize the Resident Preference from Scrutiny under the Privileges and Immunities Clause.

The City contends that this Court's recent decision in White v Massachusetts Council of Construction Employees, ___U.S.___, 103 S.Ct. 1042 (1983), which upheld on Commerce Clause grounds a Boston executive order requiring at least half of the work force on city funded construction projects to be bona fide city residents because the city was acting merely as a market participant, requires the same determination as to appellant's Privileges and Immunities challenge herein (City's Brief at 19-21).

But the Privileges and Immunities Clause is not the Commerce Clause twice stated in the Constitution. Appellees

completely ignore the vital difference between the two provisions. Unlike the Commerce Clause, which is essentially Congress' Clause, with an implied restraint on state action, the Privileges and Immunities Clause is a charter of personal rights, imposing a direct limitation on governmental action.

Moreover, unlike in White, in which the Court found that under the Commerce Clause, Congress may "affirmatively permit the type of parochial favoritism" expressed in resident preference enactmants, Id. at 1047, Congress is powerless to authorize state discriminations that otherwise violate the Privileges and Immunities Clause.[33] Contrary to the City's claims and as the City admits elsewhere in its brief, the ordinance applies to federal money

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[33]Nor is Camden's ordinance in harmony with Congressional enactments. Thus, pursuant to 49 U.S.C. §1602(a)2(c) (1983), which provides for grants or loans to state and

(City's brief at 5n.9). Indeed, the ordinance will be applied to a transportation terminal, the largest project to come under

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local public agencies from the Urban Mass Transportation Administration (the agency supplying funds for Camden's Transportation terminal): "No grant or loans funds shall...be used to support procurements utilizing exclusionary or discriminatory specifications." In an opinion letter dated October 11, 1983, Chief Counsel of UMTA stated that Alaska's local employment preference statute violated 49 U.S.C. §1602(a)(2)(c) and nothing in White compelled a contrary conclusion) (For a copy of the opinion, see Appendix B, A-12, attached hereto). Similarly, the Department of Transportation regulations promulgated by the Federal Highway Administration mandate:

> (b) No procedure or requirements shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a federal aid project. The selection of labor to be employed by the contractor on any Federal aid project shall be of his own choosing.

23 C.F.R. §635.124 (b)(1983)(emphasis added).

the ordinance to date, which will be built primarily with federal funds, and exclusively with non-City funds.

Unlike the Commerce Clause, which is textually linked to an affirmative grant of power to Congress, the Privileges and Immunities Clause imposes a direct limitation on the power of state governments to discriminate against out-of-state residents. Thus, in an analogous situation in Katzenbach v. Morgan, 384 U.S. 641 (1966), in which this Court held that, the Fourteenth Amendment's express grant of congressional enforcement power allowed congressional imposition of greater restraints on state discrimination, the Court expressly denied any congressional power "to restrict, abrogate, or dilute [the Amendment's equality] guarantees." Id. 651 n.10. Certainly, the interstate equality guarantee of Article IV, §2

likewise is immune from congressional abrogation.[34]

The underlying vision and promise of the Privileges and Immunities Clause is frustrated, regardless of whether the exclusion of out-of-state residents from access to private employment construction jobs occurs on projects funded solely by the City on projects funded in whole or in part with federal revenues.

C. Camden's Exclusion of Nonresidents from Forty Per Cent of the Jobs with Private Employers on Public Works Construction Projects Fails to Pass Scrutiny under the Privileges and Immunities Clause, Because There Is No Evidence That Nonresidents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed and That the Discrimination Practiced Bears a Substantial Relationship to the Evil That the Out-of-State Residents Are Said to Present.

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[34]Although the issue has never been formally addressed by this Court, Professor Tribe, who was counsel for the City of Boston in

Although it is well established that the Privileges and Immunities Clause limits a state's power to bias private employment opportunities in favor of its own residents at the expense of out-of-state residents, Hicklin v Orbeck, supra, 437 U.S. at 525, the appellees conveniently ignore the specific two-pronged test established by this

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White, has stressed that congressional power to consent to discrimination against interstate commerce under the commerce clause

> cannot properly be extended to a conclusion that Congress has limitless power to authorize state discrimination against out-of-state citizens. The privileges and immunities clause of Article IV, §2, for example, confers a personal right against state action unjustifiably discriminating against out-of-state citizens whether or not such discrimination is congressionally authorized.

L.TRIBE, AMERICAN CONSTITUTIONAL LAW §6-31, at 403 n.18 (emphasis in original). See, also, Varat, State "Citizenship" and Interstate Equality, supra, 48 UNIV. OF CHIC. L. REV. at 568-571.

Court to scrutinize violations of the Clause. The State has not satisfied its burden of proving that nonresidents "constitute a peculiar source of the evil at which the statute is aimed" and that the discrimination worked against nonresidents bears "a substantial relationship to the particular 'evil' they are said to present." Hicklin v. Orbeck, supra, at 526, 527.

Camden offers no evidence that nonresidents have either caused or exacerbated the City's unemployment problems. Moreover, even if nonresidents can somehow be shown to be a "peculiar source of the evil," there is no "substantial relationship" between the interest served and the discrimination practiced. The Camden ordinance does not draw its preference in terms of "unemployed residents," but instead only in terms of Camden resi-

dents. The ordinance provides an across-the-board blanket preference to all City residents, whether employed or unemployed and disadvantages all out-of-state residents, regardless of their own economic hardship.[35] Such an untargeted employment preference was considered by the Hicklin Court to belie the stated purpose of alleviating unemployment, Id. 527-528.

Implicitly conceding that the enactment cannot pass constitutional muster under the established Privileges and Immunities test, the City devises a new standard, seeking to justify its resident preference on the grounds that it is a "reasonable response to gravely pressing local needs." (City brief at 23). Neither reasonable nor limited, the ordinance applies to all public works construction

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[35]Nor can Camden justify its resident preference as furthering affirmative action. The ordinance's minority hiring provision is completely unaffected by the challenge

projects, whether built with funds locally generated or funded entirely from federal or state sources which the City administers. It applies regardless of the situs of the work. It imposes hiring restrictions not on municipal employees, but on wholly private parties and seeks to bias the private employment relationships and referral decisions of sub-contractors and union hiring halls who have no direct

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to the City's resident preference. Moreover, the ordinance may very well have adverse consequences on minority unemployment. In 1981, black unemployment in the City of Philadelphia was 21.2 per cent, 50,000 black Philadelphians were out of work. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, GEO. PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1981 BULLETIN 2156 (Dec. 1982). Thus, there are more Black Philadelphia residents who are unemployed than Camdens total Black population. Moreover, the total Black population in Philadelphia of approximately 638,878, is about eight times the total Camden population. Source: U.S. COMMERCE DEPARTMENT, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING AND POPULATION.

relationship with the City whatsoever. Unlike Toomer and Mullaney, in which the affected out-of-state residents merely paid a higher license fee to engage in their chosen occupation, here the out-of-state residents are absolutely excluded from a significant segment of private employment opportunities. Moreover, this ordinance involves not the direct distribution of state resources to residents, but rather an attempt by Camden to use its immense leverage of access to resources in order to bias private relationships towards parochial interests.

In seeking to impose its resident hiring preference on wholly private parties, appellees ignore the heretofore dispositive significance of the distinction between a city setting the terms and conditions of employment of the city's employees and a city determining how a pri-

vate employer will set the terms and conditions of employment of that private employer's employees.[36] All of the affected individuals are private employees,[37] and

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[36]Thus, in an analogous situation this Court stressed:

> [The National League of Cities Court] began by drawing a sharp distinction between congressional regulation of private persons and business 'necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside,'...and federal regulation-'directed not to private citizens, but to the States as States'... As to the former, we found no Tenth Amendment impediment to congressional action. (citations omitted).

Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264, 286 (1981). Accord, United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982); National League of Cities v. Usery, 426 U.S. 833 (1976). Moreover, striking down a municipal restriction on the hiring decisions of private employers is neither interfering with "matters that are indisputably 'attribute[s] of state sovereignty'"...or "directly impair [a municipality's ability] 'to structure integral operations in areas of traditional governmental functions'"...(citations omitted). Hodel, 452 U.S. at 288.

[37]None of the effected employees can be con-

contrary to appellees' supposition, state and local governments do not have "plenary authority" unrestrained by the Constitution to determine the basis on which private entities treat their employees.[38]

Camden is certainly not precluded from "serv[ing] as [a] laborator[y] for the development of new social, economic and political ideas" for solving pressing local problems. Federal Energy Regulatory Comm. v. Miss., _____U.S._____102 U.S. Ct. 2126, 2152(1982) (O'Connor, J., dissenting). But in so doing, it may not,

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sidered public employees. The city does not hire them, fire them, pay them, set terms or conditions of employment or negotiate with them or their representatives about their employment. Certainly, neither the actions of these contractors or their employees would constitute state action. Blum v. Yarestsky, _____ U.S._____, 102 S. Ct. 2777 (1982).

[38]Thus, for example, whereas under National League of Cities, municipal employees are not subject to the provisions of the Fair Labor Standards Act, if those employees are hired by private employer contracting with the City to per-

as it has done here, adopt means which are repugnant to the very ideals upon which our Constitution was drafted. Although Camden has wide discretion to enact its programs, the City's discretion ends where Constitutional violations begin. Moreover, in seeking to solve its ills by exporting the problem of unemployment, Camden has adopted a solution heretofore not permitted by the federal Constitution.[39]

In the coming decades, the nation's states and cities will be forced to struggle with scarce resources and regional conflicts. Let the Camden resident preference receive the dignity of constitutional benediction, and America will be

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form the same tasks, provisions of the Fair Labor Standards Act apply and the Tenth Amendment does not insulate municipal conduct from constitutional scrutiny.

[39] Edwards v. California, 314 U.S. 160 (1941). Cf. Shelly v. Kraemer, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities").

converted into a multitude of isolated and separate enclaves, each pursuing its own parochial self-interest. The Privileges and Immunities Clause is no fair weather protection against discrimination. Its operation has never been limited to times of economic security when there is no pressure upon governmental entities to curtail economic opportunity.

> Let such an exception be admitted and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief list or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was formed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

CONCLUSION

For the foregoing reasons, appellant respectfully urges that the judgment of the New Jersey Supreme Court be reversed and the Camden resident preference be declared unconstitutional.

STEVEN K. KUDATZKY
JAMES KATZ
HILARY B. KLEIN
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
41 South Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

APPENDIX A

The following three enactments were all adopted by various governmental entities in New Jersey since passage of the Camden resident preference.

EXECUTIVE ORDER #83-1

WHEREAS, there are many projects publicly bid by this County from time to time involving the construction, renovation, maintenance or repair of buildings, roads and bridges, as well as numerous other projects involving the utilization of construction firms; and,

WHEREAS, it is important and necessary to the residents and taxpayers of this County that, as far as practicable and permitted by law, such projects as outlined above should be carried out by residents, companies or firms located within the County; and,

WHEREAS, it is in the public interest

to amend and change the present job specifications for bidding purposes on the types of Projects outlined above to require that at least fifty percent (50%) of the employees or workers to be utilized on such jobs be residents of this County;

NOW, THEREFORE, BE IT RESOLVED, by the powers vested in me as County Executive of the County of Mercer, I hereby ORDER that a requirement be placed in the current bid specifications in Projects relating to the construction, renovation, maintenance or repair of County buildings, roads or bridges and similar tasks that would notify prospective bidders that at least fifty percent (50%) of the personnel to be utilized on such jobs be residents of the County of Mercer; and,

BE IT FURTHER RESOLVED, that copies of this policy be forwarded to the Board of Chosen Freeholders, Director of the

Division of Purchasing, Director of the Department of Public Works, and the County Engineer.

Dated: February 2, 1983

/s/
BILL MATHESIUS,
MERCER COUNTY EXECUTIVE

EXECUTIVE ORDER

WHEREAS, there are many projects publicly bid by this Township from time to time involving the construction, maintenance, or repair of buildings, roads and bridges, as well as numerous other projects involving the utilization of construction firms, and

WHEREAS, it is important and necessary to the residents and taxpayers of this Township that, as far as practicable and permitted by law, such projects as outlined above should be carried out by residents, companies or firms located within the Township, and

WHEREAS, it is in the public interest to amend and change the present job specifications for bidding purposes on the types of projects outlined above to require at least fifty percent (50%) of the employees

or workers to be utilized on such jobs be residents of this Township;

NOW, THEREFORE, by the powers vested in me as Mayor of the Township of Hamilton, I hereby ORDER that from this date forward, all specifications for bid contain a requirement that residency within the Township be considered in award of bid; and in all bids for construction and/or building, the contractor shall make every effort to employ persons residing within the Township, then within the County, but in no event shall less than fifty percent (50%) of the entire labor force be residents of the Township and County in the aggregate.

/s/
JOHN K. RAFFERTY
MAYOR

DATED: 7/19/83

ORDINANCE

OF THE

CITY OF ATLANTIC CITY, N.J.

AN ORDINANCE to provide for the employment of residents on construction projects funded in whole or in part by City Funds or funds which in accordance with a Federal Grant the City expends or administers; and

WHEREAS, it is in the vital policy interest of the City of Atlantic City to promote the employment of its residents in construction projects funded by City Funds or Federal Funds which in accordance with the grant the City administers said funds; and

WHEREAS, requiring that certain construction contracts be performed with the use of City Residents will result in greater economic benefits to the City

flowing from local expenditures of residents salaries.

NOW, THEREFORE, the Council of the City of Atlantic City does Ordain:

Section 1 - DEFINITION OF BONA FIDE RESIDENT:

Bona Fide Resident is a person having a permanent domicile within the City and one which has not been adopted with the intention of again taking up or claiming a previous residence acquired outside the City.

Section 2 - DEFINITION OF DEVELOPER/ CONTRACTOR:

Developer/Contractor means any party performing or offering to perform a contract for any construction project to which this Ordinance applies.

Section 3 - REQUIREMENT TO USE BONA FIDE CITY RESIDENTS:

On any construction project funded in whole or in part by City

funds, or funds which in accordance with a Federal Grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft by craft basis shall be performed at least fifty (50%) percent by bona fide Atlantic City residents. The requirement of this paragraph shall be material provision of the contract.

Section 4 - **DEVELOPER/CONTRACTOR'S CONTRACTING OBLIGATIONS:**

The Developer/Contractor to whom this Ordinance is applicable, shall submit to all contractors and subcontractors copies of this Ordinance and shall make compliance with it, a specification of all bids. The Developer/Contractor shall require that by submitting a bid, a contractor

or sub-contractor certifies that he/she shall comply with the requirements of this Ordinance.

Section 5 - NON-COMPLIANCE:

Compliance with the provisions of this Ordinance shall be monitored by the Office of Affirmative Action in the Department of Administration. The Office of Affirmative Action in the Department of Administration shall adopt appropriate Rules and Regulations to enforce and monitor the provisions of this Ordinance, including appropriate Rules and Regulations granting waivers from the provisions of this Ordinance in those situations in which after a good faith effort at compliance with this Ordinance, by a Developer/Contractor, compliance is impractical, impossible

or unreasonable. All such Rules and Regulations promulgated hereunder shall become effective upon filing same with the Municipal Clerk. Failure of a Contractor/Developer to comply with the provisions of this Ordinance or any Rule or Regulation promulgated hereunder, may lead to the following sanctions:

(a). Withhold contract or grant payments.

(b). Recommend termination or suspension of the contracts in whole or in part to the City Council.

(c). Those sanctions imposed by Rules and Regulations duly adopted pursuant to this Ordinance.

(d). Take all other actions available at Law or in

Equity for the Breach of a Material Condition of a Contract.

Section 6 - REPEALER:

All Ordinances or parts of Ordinances inconsistent with any of the terms of this Ordinance are hereby repealed to the extent of such inconsistency or inconsistencies.

Section 7 - EFFECTIVE DATE:

This Ordinance shall take effect as provided by Law upon its final passage and publication.

Adopted on second and final reading on October 19, 1983.

APPENDIX B

(opinion of UMTA Chief Counsel delcaring Alaska's resident preference violative of 49 U.S.C. §16029(a)(2)(c))

400 7th Street S.W.
Washington, D.C. 20590

U.S. DEPARTMENT OF TRANSPORTATION

Headquarters

URBAN MASS TRANSPORTATION ADMINISTRATION

OCTOBER 11, 1983

Ms. Jan De Young
Assistant Attorney General
1031 West 4th Street, Suite 200
Anchorage, Alaska 99501

Dear Ms. De Young:

This is in response to your request to Mr. Edward Gill of my staff for a clarification of the Urban Mass Transportation Administration's (UMTA) position vis a vis State laws which give a preference to State residents in contracts funded in part by UMTA.

Alaska's local employment preference statute, 36.10.010, appears to be in conflict with section 3(a)(2)(C) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. §1602(a)(2)(C)) (UMT Act). Section 3(a)(2)(C), which is contained in both the Standard Urban Mass Transportaion

Agreement, Part II, Terms and Conditions and in UMTA Circular 4220.1A, provides that Federal grant funds shall not be used "to support procurements utilizing exclusionary or discriminatory specifications."

It has been UMTA's longstanding position that local preference provisions constitute exclusionary or discriminatory requirements. A separate Alaska statute, 36.10.040, provides that the local preference requirements may not be enforced in a manner that conflicts with Federal statutory prohibition of preferences or discrimination among United States citizens. Alaska statute 36.10.040 is applicable, since enforcement of Alaska statute 36.10.010 conflicts with section 3(a)(2)(C) of the UMT Act.

The recent opinion of the United States Supreme Court in White v. Massachusetts Council of Construction Employers, Inc., ____U.S.____, 51 U.S.L.W. 4211, 103 S.Ct. _____ (1983) does not provide a basis for allowing local preferences under an UMTA funded project. In White the Court upheld a local employment preference executive order issued by the Mayor of Boston. That order applied to both federally funded and locally funded construction projects. Only the Court's analysis regarding federally funded projects is pertinent here. The Court upheld the local preference requirement, since the Federal grant programs which were affected by the Boston order "affirmatively permit the type of parochial favoritism expressed in the order." The construction projects involved in White were funded under Urban Development Action Grants (UDAGs), Community Development Block Grants (CDBGs) and Economic Development Administration Grants (EDAGs). The imple-

menting regulations under UDAG, CDBG and EDAG, unlike the UMTA requirements, either encourage or require local employment preferences.

On the other hand, section 3(a)(2)(C) of the UMT Act and UMTA Circular 4220.1A expressly prohibit discriminatory or exclusionary specifications. The White opinion upholds local preference requirements in federally funded projects when the applicable Federal law affirmatively sanctions local preference requirements. However, White does not establish that local preference requirements will be upheld in federally funded projects when the applicable Federal law either prohibits or is silent in regard to local prefence requirements. The parties in White had stipulated that Boston's local preference order applied to Department of Transportation (DOT) funded projects. However, the Court noted that nothing in the record indicated that DOT funds were involved. Therefore, White was decided as though DOT funds were not involved.

In addition to the prohibitions of section 3(a)(2)(C) concerning discriminatory specifications, section 165(d) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424) specifically provides that State buy America or buy national requirements that are more restrictive than the Federal Buy America requirements governing mass transportation procurements (Sec. 165(a)-(c) of Pub. L. 97-424) are not only permitted, but must be given deference by UMTA. The statutory provision only allows a State to impose a stricter buy national provision, and does not allow a State to impose a buy State or buy local provision on a procurement utilizing UMTA funds.

It should be noted that since Fiscal Year 1981, Congress has directed UMTA to give deference to State buy national requirements. The Conference Report for the DOT and related Agencies Appropriations Act for Fiscal Year 1981 (House Report No. 96-1400 (September 25, 1980) pp. 16-17) however, specifically states that "[t]he conferees do not intend the term 'State domestic preference law' (as used in the Appropriations Act) to include so-called 'buy - State laws' which require preferences for products manufactured in a particular State or subdivision and any such State laws shall not prevail over Federal law."

It is our opinion that enforcement of Alaska statute 36.10.010 in an UMTA funded project would directly conflict with §3(a)(2)(C) of the Urban Mass Transportation Act. Furthermore, the White decision does not provide any basis for enforcing local preferences in an UMTA funded project. Therefore, enforcement of the Alaska local preference statute could seriously jeopardize Federal participation in these projects.

Sincerely,

G. Kent Woodman
Chief Counsel

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC-1:SBLUM:&EGILL:syw10-6-83:X6403
cc: UCC Subject File/UCC Chron/UCC-1 Chron/UCC-5 Chron/UCC-1/Blum Chron/UGM-30/URO-10 UMTA File (Return)

The Alaskan statute of §36.10.010 reads:

> Sec. 36.10.010. Employment preference. In the performance of contracts let by the state or a political subdivision of the state for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 95 per cent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 per cent residents shall be employed where they are available and qualified. In all cases of public works projects, preference shall be given to residents. (§ 1a ch 177 SLA 1960; am §11 ch 142 SLA 1972; am §1 ch 208 SLA 1972).

Effect of amendments. - The first 1972 amendment substituted "or a political subdivision of the state" for "boroughs, cities and school districts" in the first sentence.

The second 1972 amendment, in the first sentence, substituted "consulting" for "or" and inserted "or any other retention of services necessary to complete any given project."

Am. Jur. reference. -43 Am. Jur. Public Works and Contracts, § 128.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 81-2110

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN, and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

Wayne S. Henderson
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02108
(617) 367-0174

Counsel for Amicus Curiae

QUESTIONS PRESENTED

In an effort to alleviate local unemployment, the City of Camden adopted an ordinance which absolutely excludes out-of-state workers from a minimum of 40% of all jobs in a major segment of the public and private construction industry in Camden, and limits those employment opportunities to persons who have been domiciled in the City for a continuous 12-month period.

1. Does the ordinance violate the protection afforded to nonresidents by the interstate Privileges and Immunities Clause to pursue their livelihoods in other states free from discrimination?

2. Does the durational residency aspect of the ordinance infringe upon the right to travel interstate, and thereby violate the Equal Protection Clause of the Fourteenth Amendment?

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MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

New England Legal Foundation, pursuant to Rule 36.1 of the Rules of the Supreme Court, respectfully moves this Court for leave to file its brief amicus curiae, bound with this Motion, in support of the Appellant.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation,

organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the economic and constitutional interests of the people and businesses of New England. NELF has long been interested and involved in the constitutional and public policy issues surrounding the proper roles of the states vis-a-vis the federal government and each other. The Foundation has consistently supported the proposition that it is essential to the maintenance of our Federal Union that no state, nor any of its political subdivisions, may possess the power to impose economic barriers to the free flow of interstate commerce, or to adopt protectionist measures designed to favor local residents at the expense of the citizens of its neighbors.

NELF has previously participated as an amicus party in Kevin H. White v. Massachusetts Council of Construction Employers, ___ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983), in

which a similar municipal residents hiring preference was upheld against a Commerce Clause challenge. NELF's brief amicus curiae therein argued the invalidity of the hiring preference for local residents under both the Commerce Clause and the Privileges and Immunities Clause of Article IV, section 2.

The amicus believes that equality of economic opportunity is a right fundamental to achieving the unity of purpose and freedom of enterprise which are central to our democratic form of government, and which are embodied in the Privileges and Immunities Clause of the Federal Constitution. The denial of employment opportunity based solely upon the circumstance of residence violates these vital constitutional guarantees.

The construction trades are particularly threatened by a residency-based hiring quota as is established by the City of Camden ordinance at issue herein. The business of construction relies

upon a work force which is both highly specialized and skilled and is necessarily mobile. Its mobility is dictated by the irregular nature of the work itself. And the limited availability of construction work within any single municipality requires the construction worker — particularly if a skilled specialty worker -- to commute to varying job sites which shift continually upon completion of each project. To impose a residency requirement upon a construction worker would eliminate a significant measure of his employment opportunities. And to demand of construction contractors a hiring quota based upon residence would necessitate a separate core work force in each locality, at an unavoidable increase in the cost of construction and at the inevitable expense of the quality of the finished construction project, all due to a mandate to hire with regard not to qualification, but to residence. The amicus opposes this intrusion upon long-recognized and vital constitutional guarantees.

For the foregoing reasons, New England Legal Foundation respectfully requests that this Court grant leave to file the accompanying brief in support of the Appellant.

By its attorney,

Wayne S. Henderson
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02108
(617) 367-0174

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF NEW ENGLAND LEGAL FOUNDATION, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief amicus curiae is filed contingent on the allowance of the foregoing Motion for Leave to File said brief. The interest of the amicus curiae in this case is set forth in that Motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The interstate Privileges and Immunities Clause was intended "to help fuse into one Nation a collection of independent, sovereign States," Toomer v. Witsell, 334 U.S. 385, 395 (1948), by establishing a "norm of comity" in the treatment of the citizens of the several states, making nonresidence an improper basis for locating a special burden, Austin v. New Hampshire, 420 U.S. 656, 662 (1975). This policy of comity is of importance not only to individual rights to nondiscriminatory treatment, but also to the structural balance essential to the concept of federalism. Id. When the right of economic opportunity in the pursuit of a livelihood — a right held "fundamental" to the Privileges and Immunities Clause — is implicated, the Constitution places limitations upon the extent to which employment opportunities may be biased against a nonresident by reason of his nonresidency alone. Hicklin v. Orbeck, 437 U.S. 518, 525 (1978).

Only when nonresidents are shown to be a "peculiar source of the evil" intended to be remedied, and only when the discrimination practiced bears a "substantial relationship" to the evil nonresidents present, is a scheme discriminatory on the basis of residence permitted. Id. at 526-28.

In seeking to alleviate local unemployment by barring out-of-state workers from 40 percent of all public works construction jobs and a significant segment of the private construction market, the City of Camden has acted in clear violation of that fundamental principle of comity. It has attempted to isolate itself from a problem common to all states, protecting its own residents from competition by denying to nonresidents their right to compete on an equal footing in the Camden construction market.

The Camden ordinance at issue herein establishes a mandatory quota for the employment of City residents on every construction project for which the City "spends funds derived from any

public source," or where the City "confers a direct financial benefit" in excess of $50,000.00[1] On

[1] The grant of a property tax abatement is excluded. A 54-55. The ordinance is set forth in its entirety as Appendix C, at A36-58 (record references are to the Appendix to the Jurisdictional Statement herein). In relevant part it provides as follows:

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply....The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more. [A54-55].
>
> C. Developer/Contractor's Contracting Obligations.
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden. [A56].
>
> I. Definitions.
>
> 5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period

each such project at least 40% of the entire labor force must be City residents. Several points are worthy of note. First, the ordinance is without reference to job qualifications. Its requirements, therefore, must be met regardless of the level of skill of the job applicant. The contractor must hire according to the applicant's place of residence, and then presumably provide him the training necessary to render him of use on the workforce. The inevitable result of such a measure is to increase the cost of doing business for a contractor who performs work within the scope of the ordinance. Second, the measure applies on its face not only to public works construction projects financed solely

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Ftnote Continued

> of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [A38].

by the City, but also apparently to private development projects induced by federal "public" funds which the City merely administers, as well as to "the development and construction of all residential housing of four (4) units or more," A55, regardless of their funding sources.

Third, the 40% requirement is merely a minimum level of compliance. The developer/contractor must "make every effort" to employ local residents. A56. The effect upon nonresidents, therefore, is to foreclose the availability of at least 40%, and perhaps far more, of the affected employment opportunities. Fourth, the ordinance's application to "the entire labor force," A56, and to "all contractors and sub-contractors," A40, A46, extends its reach far beyond those parties immediately in contract with the City. Its impact is by no means limited to persons in some sense "employees" of the City. And fifth, the ordinance mandates not simply a preference, but a quota, a measure even more

intrusive of personal rights. A quota demands that a contractor affirmatively recruit employees satisfying the residence requirement, rather than merely give preference to a Camden applicant over an equally qualified nonresident.

This is not a case wherein a municipality is determining the dispensation of governmental benefits according to appropriately drawn distinctions. It is, instead, an instance of governmental intrusion into the contractual relationships between private parties, in order to carry out a purpose which is plainly protectionist of local economic interests. The City is choosing which persons, among the class of construction workers comprised of both residents and nonresidents, may compete for employment within a certain segment of the private construction industry. The ordinance requires that City residents be eligible for 100% of the construction jobs, while any nonresident of the City, including any nonresident of the State, is limited in

eligibility at most to only 60% of those positions.

While the Commerce Clause may provide no prohibition against such a restriction to the extent that it is applied strictly to wholly city-funded public works projects, White v. Massachusetts Council of Construction Employers, ___ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983), the interstate Privileges and Immunities Clause proscribes any such discriminatory scheme which fails the two-part test set forth in Hicklin. The City of Camden has offered no justification for singling out nonresident employees of the construction industry to bear the burden of alleviating the City's unemployment problems. Nor has it demonstrated the likelihood that its discrimination is appropriately drawn to accomplish that end.

It is clear that a state law, such as the New Jersey statute invalidated in Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981), which grants an

absolute job preference to state residents on all public works construction projects, violates the Privileges and Immunities Clause. To accept Camden's argument that it should nonetheless be immune from scrutiny when it adopts an ordinance designed to further that same end would allow the cities and towns of any state to accomplish what the state itself cannot. The ordinance can find no protection from constitutional attack in the fact that, by drawing a residence-based classification along city lines rather than state lines, it accomplishes an even greater discrimination.

The Camden ordinance is, moreover, repugnant to the equal protection principles of the Fourteenth Amendment. The City's 12-month durational residency requirement for eligibility for the construction jobs at stake distinguishes between its long-term residents and recent arrivals on the basis of the exercise of the fundamental right of interstate travel. Such a discriminatory provision must be judged according to the most

stringent measure of equal protection analysis. Zobel v. Williams, ____ U.S. ____, 102 S. Ct. 2309 (1982). The City has failed to establish a valid governmental interest sufficiently compelling and adequately served to justify the ordinance.

ARGUMENT

I. THE CITY OF CAMDEN'S ORDINANCE DISCRIMINATING AGAINST OUT-OF-STATE RESIDENTS ON THE BASIS OF THEIR RESIDENCY IS VIOLATIVE OF THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Privileges and Immunities Clause Was Intended to Provide Protection Against Unequal Treatment, Based upon State Residency, in Commercial Pursuits.

It has been an essential and overriding attribute of our national structure that there be explicit limitations upon the power of each state to create unnecessary distinctions between residents and nonresidents in the exercise of rights considered of fundamental importance to national citizenship. These limitations were inspired both by the concern for that social and political

cohesion necessary and "basic to the maintenance or well-being of the Union," Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 388 (1978), and by the desire to establish a free and unfettered national economy, in order to promote commercial productivity as well as to thwart "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

This principle of non-discrimination on the basis of residence finds its origins well prior to the creation of the Union itself.[2] In the Fourth of the

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[2] Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487 n. 1 (1981): In 1976, even before the American colonies became States, a committee of the Continental Congress, appointed to propose articles of confederation, drafted two articles protecting the inhabitants of one colony from discrimination by another. See, Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & Mary L. Rev. 1, 2-5 (1967). English law protective of "alien friends" is traced to the Magna Carta in R. Howell, The Privileges and Immunities of State Citizenship 9-13 (1918). According to Howell, by the time of the Articles of

Articles of Confederation, designed "to secure and perpetuate mutual friendship and intercourse among the people," the Framers sought to provide for a basic equality of treatment among the citizens of the different States with regard to

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Ftnote Continued

Confederation, "independently of any constitutional provision, the citizens of the thirteen original states were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State." Id. at 13. In his view, the constitutional provisions were drafted to extend the scope of these protections and render them more secure. Id. See also, L. Tribe, American Constitutional Law 427 (1978) (American tradition of "natural law" evolved during the 17th and 18th centuries, holding implied limitations upon governmental authority intruding upon "natural rights" reserved to the people); Note, "The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights," 33 U. Miami L. Rev. 691, 694-96 (1979).

individual rights and commerce.[3] In the area of individual rights, that anti-discrimination principle was later carried over into the comity article of the Constitution, in the Privileges and Immunities

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[3] Article IV of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

9 Journal of the Continental Congress, 908-909 (1777) (Library of Congress ed. 1907); quoted in Hicklin v. Orbeck, 437 U.S. 518, 532 n. 16 (1978).

Clause of Article IV,[4] in briefer form but with no change in substance or intent, unless "to strengthen the force of the Clause in fashioning a single nation." Austin v. New Hampshire, 420 U.S. at 661 (footnote omitted).

The interest in ensuring unrestricted trade among the states created another major impetus for the drafting of the Constitution, in part out of a recognition that the economic interests of the nation as a whole, and of each individual state as a consequence, lay in the establishment of such a truly national market. The Federalist, No. 11, (A. Hamilton) (J. Cooke ed. 1961) p. 71; see, id., No. 42, (J. Madison) p. 283; cited in Reeves v. Stake, 447 U.S. 429, 448 (1980) (Powell, J., dissenting). But the Framers were also concerned over the fractionalizing forces of economic competition

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[4] The Privileges and Immunities Clause holds that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1.

between the states, evidenced in discriminatory tax or regulatory burdens upon the commercial intercourse between them. Each state might, it was feared,

> pursue a system of commercial polity peculiar to itself [which] would occasion distinctions, preferences, and exclusions, which would beget discontent.... We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest. The spirit of enterprise, which characterizes the commercial part of America,...would [not likely] pay much respect to those regulations of trade, by which particular states might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars. The Federalist, No. 7, (A. Hamilton) (J. Cooke ed. 1961) pp. 39-40 (emphasis in original); and see, id., No. 22, (A. Hamilton) p. 137; No. 42, (J. Madison) p. 283.

These principles have consistently informed judicial consideration of state action which establishes a discrimination between the commercial interests of in-state and out-of-state residents. As a result, a state law establishing an employment preference for in-state residents has been held violative of the Privileges and Immunities Clause, based upon the anti-discrimination and federalist principles found in case precedents both under that constitutional provision and under the "mutually reinforcing" Commerce Clause. Hicklin, 437 U.S. at 531-34.

B. The Privileges and Immunities Clause Applies to the Exclusion of Out-of-State Residents From a Major Segment of the Camden Construction Market.

It has long been recognized that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."

Ward v. Maryland, 12 Wall. 418, 430 (1870). What has become the modern understanding of the reach of the Privileges and Immunities Clause was first set forth in Toomer v. Witsell, 334 U.S. 385 (1948), in which a South Carolina law limiting commercial access by nonresidents to migratory shrimp within state waters was struck down. The Toomer Court began its analysis from a recognition that one of the privileges which the Clause guarantees to a nonresident is that of doing business within a state "on terms of substantial equality with the citizens of that State." Id. at 396. Federal and state courts have also applied the Privileges and Immunities Clause to strike down statutes which require higher costs for commercial enterprise by nonresidents, Mullaney v. Anderson, 342 U.S. 415 (1952) (license fees for commercial fishermen); which unnecessarily inhibit a nonresident's opportunity to engage in his chosen profession, Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D. N.H. 1982) (residency requirement

for applicants for admission to the bar), and cases cited; and which restrict the availability to nonresidents of employment in public works construction, Salla v. County of Monroe, 423 N.Y.S. 2d 878, 399 N.E. 2d 909 (1979), cert. den. sub nom., Abrams v. Salla, 446 U.S. 909 (1980); Neshaminy Constructors, Inc. v. Krause, supra; Mass. Council of Construction Employers v. White, 384 Mass. 446, 425 N.E. 2d 346 (1981), rev'd on other gr'nds sub nom, White v. Mass. Council of Construction Employers, ____ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983). While access to recreational hunting has not been considered a "fundamental" right, Baldwin v. Montana, supra, "a nonresident's right to pursue a livelihood in a State other than his own [is] a right that is protected by the Privileges and Immunities Clause." Id. at 386 (citations omitted). See also, Hicklin, 437 U.S. at 524, and cases cited.

C. That the Camden Ordinance Also Excludes Some New Jersey Residents, Or That it May Not Violate the Commerce Clause, Does Not Immunize it From Privileges and Immunities Clause Analysis.

The City argues that because New Jersey residents living outside Camden are excluded along with out-of-state residents from the construction projects subject to the City's ordinance, the ordinance should be considered immune from review under the Privileges and Immunities Clause. But the Privileges and Immunities Clause provides no basis for a distinction between the action of a state and the action of a municipality which is equally inimical to the purposes of the Clause.

By its very terms, the Privileges and Immunities Clause confers a personal right. It is not confined to discriminatory actions of a state, but ensures that no person shall suffer prejudice by reason of his state of residence. The purpose of the provision is "to place the citizens of each State upon the same footing with citizens of other

States, so far as the advantages resulting from citizenship in those States are concerned." Hicklin, 437 U.S. at 524; quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).

There is nothing in the identity of a municipality, as distinct from a state, which renders its governmental actions any the less subject to federal constitutional provisions which set forth individual rights attendant upon national citizenship. The purposes of the Privileges and Immunities Clause are no less implicated when the discrimination is accomplished against out-of-state residents by means not of a state law, but of a municipal ordinance. When a municipality acts, it does so by virtue of the measure of state authority with which it is clothed. Its existence is purely derivative, as are the powers by which it governs. A city has no sovereign power, ours being strictly a "dual system of government." Parker v. Brown, 317 U.S. 341, 351 (1943).

> All sovereign authority "within the geographical limits of the United States" resides either with "the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." United States v. Kagama, 118 U.S. 375, 379 (1886) (emphasis added).

Community Communications Company v. City of Boulder, ___ U.S. ___, 50 U.S.L.W. 4144, 4147 (January 13, 1982). A city, like a county, is "the creature of the state exercising and holding powers and privileges subject to the sovereign will." City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923). "What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974).

If the state be powerless to enact a measure discriminatory against out-of-state residents, so also is its subsidiary. To hold the City of Camden to have the power to enact by ordinance a measure prohibiting all non-New Jersey residents from engaging in commerce within the City would be to grant the City a greater constitutional power than has its parent, the State. Such a holding would also enable a collection of similar ordinances by every municipality in New Jersey to accomplish the same result which by state statute would be deemed in violation of Article IV. The result would be both illogical and contrary to the principles motivating the Privileges and Immunities Clause.

Nor is it fatal to the analysis that the measure in question draws its discrimination not at the state boundary, but at the city line. Cf., Dean Milk Co. v. Madison, 340 U.S. 349 (1951). Were each city authorized similarly to enact preferential measures prohibiting out-of-city residents from a certain sector of employment, the effect felt by an

out-of-state resident would be no different than from a state-wide requirement. He is denied the opportunity to compete equally for employment simply because of his place of residence. In-state residents as a class stand in a preferred position with regard to any and all such city-drawn discriminations, as some in-state residents (those who are in-city residents) may qualify for every position, while out-of-state residents qualify for none of the restricted positions.

Moreover, out-of-state residents suffer from the same lack of political access to municipal decision-making as they do to state government. It is this absence of political accountability which has long been held an important consideration in enforcing the protections of the Privileges and Immunities Clause. Since burdened nonresidents are not represented in the legislative halls of the state imposing the burden, judicial acquiescence in schemes establishing special burdens upon nonresidents would compel them to seek redress

through their own state; but "to prevent retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." Austin v. New Hampshire, 420 U.S. at 662-63, quoting Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82 (1920). By making nonresidence an improper premise for locating a special burden, the Privileges and Immunities Clause implicates "not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." Austin, 420 U.S. at 662. As great a threat is posed to that concept of federalism by a retaliatory measure enacted to neutralize the City of Camden's scheme — whether enacted state-wide by Pennsylvania or New York[5] or city-wide by Philadelphia or Wilmington — as if created in

[5] Maryland has, in fact, already enacted an openly retaliatory measure which prohibits public works construction employment to a resident of any state whose laws prohibit public works construction employment of Maryland residents. Md. Ann. Code, Art. 21, §8-503 (1981).

response to a discriminatory state law.

The limited exemption from Commerce Clause application established for a municipal residents hiring preference on entirely city-funded construction projects, White v. Mass. Council, supra,[6] provides no protection from Privileges and

[6] Based upon the record in White, the Court also found no Commerce Clause violation in the application of the hiring preference to federally funded projects, with whose regulatory requirements the Boston provision was held to "sound a harmonious note." 51 U.S.L.W. at 4213. The record herein provides no indication what federal programs are affected by the Camden ordinance, which on its face applies broadly to all projects on which the City "spends funds derived from any public source." A54. The ordinance would apparently, then, apply at least to those federal programs referenced in White. Whether the federal government may authorize the infringement of a personal right held fundamental under the Privileges and Immunities Clause is a question held in White to be unresolved. Id. at 4214, n. 1 (Blackmun, J., conc. in part). Congress is clearly without authority to enlist a state in a joint program which authorizes the state's violation of the Equal Protection Clause, Shapiro v. Thompson, 394 U.S. 618, 641 (1969), citing Katzenbach v. Morgan, 384 U.S. 641, 651 n. 10 (1966), and the same reasoning would seem to apply to the personal rights protected by the Privileges and Immunities Clause.

Immunities Clause analysis for the Camden ordinance. White served to define the implied contours of the dormant Commerce Clause, and not to interpret personal rights held fundamental under a specific constitutional provision. The Camden ordinance, moreover, by its reference to "the development and construction of all residential housing of four (4) units or more," A55, clearly extends its reach into the private construction market, an area which the decision in White does not immunize even from Commerce Clause scrutiny.

D. The Camden Ordinance Excluding Nonresidents from Publicly Funded Construction Jobs Fails to Pass Scrutiny Under the Privileges and Immunities Clause.

When the fundamental right of economic opportunity in the pursuit of a livelihood is implicated, the Privileges and Immunities Clause places limitations upon a state's power to bias those employment opportunities in favor of its own

residents. Hicklin, 437 U.S. at 525. In Hicklin an Alaska statute creating a hiring preference for qualified residents (as distinct from the Camden ordinance at issue herein, whose quota requirement offers no regard for qualifications) in construction work associated with the State's oil and gas resources was unanimously declared unconstitutional. Citing the two-part test first set forth in Toomer,[7] the Court held that there had been no showing that nonresidents were "a peculiar source of the evil" which the statute was enacted to remedy — namely, Alaska's high rate of unemployment. Moreover, even if that showing

[7] The South Carolina statute requiring a higher license fee for nonresident commercial fishermen was struck down by the Court in Toomer, as it created a discrimination based upon residence that was without substantial reason beyond the mere fact of nonresidence. The State failed to establish a sufficiently unique and demonstrable link between the state interests served and the discrimination practiced. The Court required something to indicate that nonresidents "constitute a peculiar source of evil at which the statute is aimed," and that practical and less restrictive alternatives are unavailable. Id., 334 U.S. at 398-99.

were to be accepted as sufficient, the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent. The across-the-board grant of employment preference to all residents, employed as well as unemployed, was not properly tailored to the statutory purpose of reducing unemployment. 437 U.S. at 526-28.

The Camden ordinance creates precisely the sort of residence-based bias of employment opportunities which Hicklin and its predecessors found to interfere with a personal right held fundamental under the Privileges and Immunities Clause. The City can satisfy neither part of the requisite two-prong test.[8] While the alleviation of local unemployment may be a legitimate local

[8] The burden of satisfying the test lies with the governmental entity which has created the residence-based discrimination. Hicklin, 437 U.S. at 526-27. See also, L. Tribe, American Constitutional Law 411 (1978).

concern, it is insufficient to justify a discriminatory scheme in the absence of any demonstration that out-of-state residents are a peculiar source of unemployment within the City. Salla v. County of Monroe, supra (state-wide employment preference on public works construction projects offends the Privileges and Immunities Clause).

There is no unique link, no "substantial relationship," Hicklin, 437 U.S. at 527, between the interest served and the discrimination practiced. The ordinance does not draw its quota in terms of unemployed residents, but only residents. If an employed resident should take a job provided to him by the mandated hiring quota, and leave behind a position not among those covered by the ordinance, or one from out-of-state, the unemployed resident gains no benefit. This type of untargeted employment preference was considered by the Hicklin Court to bely the stated purpose of alleviating unemployment. Id. at 527-28. The City

also touts the retention of economic benefits generated by expenditures of tax dollars, and the reward of those who funded them, but these are nothing more than impermissible state purposes descendent from the state ownership doctrine long ago discounted as an absolute justification for state action intruding upon fundamental individual rights. Hicklin, 437 U.S. at 528-29.

Not only is the ordinance poorly focused on its stated goals, it is in fact likely to result in consequences harmful to the economy and to consumers and taxpayers. Even as the ordinance causes a shift in unemployment to outside city and state boundaries, and discourages construction workers in the exercise of their constitutionally protected rights, it also inevitably results in higher costs of public construction because of fewer competitive bids, and increases costs for those contractors who actually perform work covered by the ordinance. The additional expense and inefficiencies created by the mandatory

employment of inexperienced and less qualified employees and the resultant organizational disruption and inconvenience, will necessarily increase costs to private developers subject to the ordinance, as well as to the City and, hence, its taxpayers. Cf., Salla, 423 N.Y.S. 2d at 882-83. The unavoidable impact of such a program is likely to be far more harmful to the economic plight of the City and its residents than would be a program designed to promote employment by providing job training, encouraging new employment opportunities, or even limiting available employment opportunities to those who are currently unemployed.

Far from creating a solution notable for its positive impact upon employment opportunities and its careful focus upon those most in need of its aid, the City of Camden has produced a prohibitory scheme whose blunderbuss approach favors all residents, whether employed or not, and disadvantages all nonresidents, regardless of their

own economic hardships. The consequences of the Camden ordinance, at least as to a significant percentage of construction employment opportunities, hardly advance the "norm of comity" which is the central purpose of the Privileges and Immunities Clause.

II. THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT OF THE CAMDEN ORDINANCE PENALIZES THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL, AND IS THEREFORE VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Camden Ordinance Infringes the Right of Interstate Travel, and the Appropriate Equal Protection Test is One of Strict Scrutiny.

The Equal Protection Clause of the Fourteenth Amendment prohibits action by state or local government tainted either by a distribution of benefits or burdens in a manner inconsistent with fundamental rights, or by a prejudice against a "discrete and insular" minority. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The Clause provides that no state shall "deny to

any person within its jurisdiction the equal protection of the laws." Amendment XIV, §1. In so doing it announces a fundamental principle, "that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948).

Since the landmark exposition of the right to travel in Shapiro v. Thompson, supra, this Court has consistently held that durational residency requirements penalizing the fundamental right to travel interstate warrant the strictest form of judicial scrutiny under equal protection analysis. See also, Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, supra.

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and

> breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Shapiro, 394 U.S. at 629.

The right to interstate travel, in the sense of the right to migrate with the intent to settle and abide, Memorial Hospital, 415 U.S. at 254-55, is penalized by a state-drawn discrimination which favors those who have chosen not to exercise that right. A durational residency requirement which prohibits certain citizens from receipt of welfare, Shapiro, from voting, Dunn, or from receiving medical care at county expense, Memorial Hospital, for reason of their recent exercise of the right to travel, will be struck down absent a legitimate and compelling state interest which the statutory scheme is drawn with precision to serve. Dunn, 405 U.S. at 343.

The City of Camden has prohibited from at least 40 percent of the employment opportunities all persons, whether bona fide Camden residents or

not, who have lived in the City for less than the one-year durational residency requirement. By requiring new residents to reside in the City for a fixed minimum period in order to be eligible for employment opportunities available on an equal basis to all other residents, the Camden ordinance triggers the equal protection test of strict scrutiny. Cf., Zobel v. Williams, supra.

The Camden ordinance is doubly suspect for its infringement of another right — that of employment opportunity — which, although not recognized as "fundamental" in the current trend of equal protection analysis, has long held a protected place under the Fourteenth Amendment. The right to work has been considered to be "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915). The history of this Court's prior consideration of that right has been set forth by Justice Marshall in dissent in

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 317 (1976):

> Whether " 'fundamental' or not, 'the right of the individual...to engage in any of the common occupations of life' " has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. [citations omitted.]... And in Smith v. Texas, 233 U.S. 630,... (1914), in invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, and that thereby excluded numerous equally qualified employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." Id., at 641,... "Insofar as man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use

> his powers of mind and body in any lawful calling." Id. at 636,... [citations omitted]

The right to earn a living admittedly does not include the right to work for the government per se. Murgia, at 313. But the application by the court below of a minimal rational basis standard to the Camden ordinance, at A27-28, misapprehends the basis for the distinction drawn by this Court between bona fide and durational residency requirements. An appropriately defined and uniformly applied requirement of bona fide residency may be necessary to preserve a basic conception of the political community, Dunn, 405 U.S. at 343-44, and may therefore be permissible in the context of direct municipal employees. Cf., McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976), and cases cited. The Camden ordinance, however, presents two significant distinguishing characteristics. Not only does it reach far beyond immediate municipal employees, by requiring residency of a given

percentage of the entire construction work force, persons who are by no means perceived as representatives of the municipality in the way that police, fire, public school, and government employees are. But of even greater significance under established constitutional precedent, the durational aspect of the Camden ordinance renders it subject to a substantially more stringent equal protection analysis than the Court below provided.

B. The Camden Ordinance's Durational Residency Requirement Fails the Equal Protection Test of Strict Scrutiny.

The distinction drawn by the Camden ordinance between 12-month residents and those more recently arrived serves no valid governmental purpose sufficiently compelling to satisfy the requisite equal protection test.

The justifications suggested by the court below for the City's ordinance, at A27-28, are either ill served by its discrimination, improper, or of too little substance to warrant such an intrusion

into constitutionally protected areas. The employment goal of the ordinance may not even be achieved by its operation, much less achieved in a manner least likely to conflict with the fundamental right to travel. Unemployment of local residents may be remedied not at all, and if so merely by chance, by a requirement that local residents be hired regardless of their own current employment status. While there may be a valid local interest in upgrading human resources and in reducing unemployment, the residency requirement fails to do so except by deterring the in-migration of nonresident construction workers. The challenged provision offers no increase in the number of available employment opportunities; it simply limits the universe of those who may compete for them. Even if a state or municipal government were to attempt to ease its unemployment problem by forcing employers to discriminate against nonresidents — a policy whose constitutional validity is at best dubious — the

means by which it does so must be more closely tailored to aid the unemployed than is a measure granting an across-the-board preference to local residents regardless of employment status. Hicklin, 437 U.S. at 527-28.

Nor may a state or locality discriminate in the offer of public employment opportunities merely to save money, State v. Wylie, 516 P. 2d 142 (Alas. 1973), the "public coffer" theory which was rejected in Shapiro, 394 U.S. at 632-33. It is not city residents alone who contribute to the "public coffer" by means of sales, parking, and other taxes which apply to commuters. Note, "Municipal Employees Residency Requirements, and Equal Protection," 84 Yale L.J. 1684, 1698 (1975). The ordinance's hiring bias is not drawn to favor only those who pay state or local taxes. A recently arrived resident is as much a current contributor to the public fisc as is his 12-month resident neighbor, and the reward of citizens for past contributions is not a legitimate state

purpose. Zobel, 102 S. Ct. at 2313. There is, moreover, an inherent unfairness in requiring an employee, who provides a day's work for a day's pay, also to contribute to the economy of the city and to its tax base. Any governmental interest in such financial benefits "is slight compared to the important interference with [the employee's] private rights." Donnelly v. Manchester, 111 N.H. 50, 52-53, 274 A. 2d 789, 792 (1971).

CONCLUSION

Unemployment is an economic ill not of local, but of national proportions, and is not solved by governmental efforts to limit employment opportunities according to political boundaries. A state, or one of its political offspring, may not simply export its unemployment by mandating the hiring of its own residents, nor may it impose the burden of alleviating unemployment solely upon the construction industry.

The City of Camden, by absolutely excluding nonresidents from even competing for, at a minimum, 40 percent of the jobs in a major segment of the construction industry, has adopted a rule which not only discriminates on its face against out-of-state residents purely on the basis of their place of residence, but also imposes upon them a burden which strikes at the very core of the freedoms which the federal Privileges and Immunities Clause was intended to protect. And by discriminating in its treatment of residents against those of shorter tenure than 12 months, the Camden ordinance triggers a stringent equal protection analysis which it does not survive. The durational residency aspect of the ordinance fails to serve a compelling governmental interest in a manner least restrictive of constitutional liberties.

For the reasons stated hereinabove, the amicus curiae, New England Legal Foundation, submits that the judgment of the New Jersey

Supreme Court should be reversed, and that the Camden resident hiring quota should be declared unconstitutional.

Respectfully submitted,

Wayne S. Henderson
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02108
(617) 367-0174

Counsel for Amicus Curiae

Dated: May 26, 1983

Office - Supreme
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN AND THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

MICHAEL L. PERLIN*
Special Counsel to the
Public Advocate
RICHARD E. SHAPIRO
Director, Division of
Public Interest Advocacy
SUZAN R. SHAPIRO
Law Intern

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

R. WILLIAM POTTER
Assistant Public Advocate

Department of the
Public Advocate
Richard J. Hughes
Justice Complex
CN 850
Trenton, NJ 08625
(609) 292-7087

*Counsel of Record

The Copy Center, Inc. 615 Chestnut Street Philadelphia, PA 19106 (215) 928-1900

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Wood, ed., The Confederation and the Constitution: The Critical Issues (1973)..... 30,40 42,43

Wyzanski, "History and Law," 26 U. Chi. L. Rev. 237 (1959)..... 18

Zagorin, The Court and the Country: The Beginning of the English Revolution (1969)..... 30

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2,[1] has, for over nine years, litigated extensively in major areas affecting "the public interest." During this period, the Department has participated in a wide variety of proceedings involving issues relating to urban affairs, housing, employment, the environment, rights of the mentally handi-

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[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings...as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30. See also, N.J.S.A. 52:27E-31 (factors to be considered in deciding whether to represent a particular public interest).

capped and utility regulation.[2] In these proceedings, the important role of the Department as a representative of the public interest has

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[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy. N.J.S.A. 52:27E-28 to 32. See, e.g., Southern Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A.2d 390 (1983) (fair share housing). This Division also participates in a wide range of activities involving concerns of the urban poor and minorities including advocacy for minority access to employment opportunities, pressing for the rights of the homeless and tenants in public housing, and ensuring adequate access to health care facilities and entitlement programs. Through this Division, the Department recently submitted an amicus brief in Silkwood v. Kerr-McGee, -- U.S. --, 103 S.Ct. 2080 (1983) (motion for leave to file granted) (case pending).

The Division of Mental Health Advocacy, which represents "indigent mental hospital admittees" in individual matters involving their "admission to, retention in, or release from" mental hospitals, N.J.S.A. 52:27E-24, and in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25, has filed amicus briefs in three other cases before this court involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 422 U.S. 584 (1974); Jones v. United States, -- U.S. --, 51 U.S.L.W. 5041 (June 28, 1983).

been frequently acknowledged.[3]

This case presents the question of whether the Privileges and Immunities (P&I) Clause in Article IV of the Constitution is violated by a municipal ordinance which establishes a resident hiring quota for public works construction contracts. The Department is concerned about the impact of this question on Camden citizens, and on residents of other inner cities, both in New Jersey and elsewhere. Its resolution by this Court will bear on the ability of such cities to develop local solutions for the alleviation of the social and economic hardships imposed on their residents by the severe unemployment problems endemic to the nation's

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[3] Recently, for example, the New Jersey Supreme Court characterized the Department as "a shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893.

cities.

The Department appears as amicus curiae to both address the historic origins of the P&I Clause, stressing the social, economic and political forces which led to the Clause's adoption, and to examine those socioeconomic circumstances which compelled enactment of the ordinance in the light of this Court's prior decisions.

All parties have consented to the filing of this amicus curiae brief and consent letters are being filed simultaneously with the Court.

STATEMENT OF THE CASE

Camden, New Jersey is a city ravaged by the contemporary effects of urban social and economic decay. The tragic and "severe economic plight that has befallen the City of Camden," United Building and Construction Trades Council v. Camden, 88 N.J. 317, 340, 443 A. 2d 148, 159 (1982), was described in compelling terms by the Supreme Court of New Jersey less than one month before the decision in the case at bar:

> Camden is one of the older urban areas in the State and is afflicted with the ills typical of these centers. Its unemployment rate generally averages two or three times the national rate; approximately 20% of the population consists of senior citizens; it has one of the highest uncollectible tax rates in the State; more than 13% of the houses are owned by the City; the residental tax base is small and consists of very modest homes; and industrial and commerical values have steadily shrunk over the last three decades.

City of Camden v. Skokowski, 88 N.J. 304, 305, 441 A. 2d 741, 742 (1982).

While statistics can never fully convey the harsh reality of Camden's problems, they do bear striking witness to the extent of the City's social and economic deterioration. For example, there has been a severe decline in employment opportunities in Camden during the past thirty years.[3A] Corresponding with the decline in available jobs has been a sharp rise in unemployment during the past several years, so that the rate of unemployment in Camden in 1982 was twice as high as that in New Jersey or the United States.[3B] The city's high unemployment rate has had a

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3A Planning Study, Division of Economic Development for the City of Camden (1980). This study is available through the Office of Development of the City of Camden.

3B Figures obtained from the New Jersey Department of Labor and Industry and the United States Bureau of Labor Statistics, and compiled by the City of Camden, illustrate the annual unemployment rates from 1976-82 for Camden, the State of New Jersey and the United States: (Footnote continued on next page)

particularly acute impact on minority residents of Camden, who constitute over 70% of the City's population.[3C] As a consequence, as recently as 1977, the unemployment rate among Blacks and Hispanics was 18.4% and 15.6% respectively (Appendix 36).

Camden's severe unemployment has

(Footnote 3B continued)

	Camden	State of N.J.	U.S.
1976	14.8%	10.4%	7.7%
1977	13.3	9.4	7.0
1978	9.6	7.2	6.0
1979	9.9	6.9	5.8
1980	10.4	7.2	7.1
1981	16.7	7.3	7.6
1982	19.7	9.0	9.7

"Average Annual Unemployment Rate", Tax Anticipation Note Prospectus, Office of Administration and Finance for the City of Camden (1983), at 6 [hereinafter referred to as OAF Prospectus]. This prospectus is also available through the Office of Development of the City of Camden.

[3C] The 1980 Official United States Census Bureau statistics reveal that Blacks represent 53% of the population and that 19.2% of Camden residents identify themselves as being of Hispanic origin. United Building and Constr. Trades Council, 88 N.J., supra, at 327, 443 A.2d at 153.

exacerbated its other problems. For example, in 1980, approximately 29% of Camden households received some form of public assistance compared to only 7.5% households in the State of New Jersey and 8% for the Nation.[3D] The average per capita income in Camden for more than a decade has been below state and national levels; in 1979, the per capita income for the City was approximately 44% less than that of Camden County, 54% less than that of New Jersey, and 38% less than that of the country.[3E]

Against this background of an imminent urban apocalypse and a "well-documented history

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3D The figures for Camden and the State of New Jersey are drawn from the 1980 Official United States Census Bureau statistics and the national figures are derived from the United States Bureau of the Census, Provisional Estimates of Social, Economic, and Housing Characteristisc--States and Selected Standards of Metropolitan Statistical Areas (1980).

3E See OAF Prospectus, supra, note 3C at p. 8.

of minority under-representation in the construction trades" in the State, United Building and Constr. Trades Council, 88 N.J., supra, at 334, 443 A.2d at 156, the Camden City Council, on July 24, 1980, adopted "An Ordinance to Establish an Affirmative Action Program in Connection with Construction Contracts to Be Performed For or On Behalf of the City of Camden." (A36-53). On August 28, 1980, the Council amended the ordinance requiring 40% of all public works contract employees to be city residents (A. 56).[3F]

On February 18, 1982, the Supreme Court of New Jersey upheld this provision and other portions of the Ordinance against a range of constitutional attacks (A. 1-32). With regard

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3F Because minorities comprise a much higher percentage of Camden's population than non-minorities, a requirement that the City's construction contracts have 40% residents will not only increase minority job opportunities but also will stimulate the economic revitalization of the City by enhancing the employment opportunities for all residents.

to the appellant's challenge under the P&I Clause, the Court stated:

> This Court declines to apply the Privileges and Immunities Clause in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality.

Id. at 341-42, 443 A.2d at 160.

On March 7, 1983, this Court noted probable jurisdiction to review this judgment.[3G]

3G The Commerce Clause issue has been foreclosed by this Court's decision on February 28, 1983, in White v. Mass. Council of Constr. Employers, -- U.S. --, 103 S.Ct. 1042 (1983).

SUMMARY OF ARGUMENT

Seeking to revitalize its stagnant economy and generate jobs for its severely unemployed population, the City of Camden enacted an ordinance in 1980, reserving 40% of all jobs in publicly-funded construction projects "for or on behalf of" the city to its residents. Nonresidents are fully eligible for the remaining 60%. The ordinance was an innovative local response to the crushing and complex problems of urban decay -- a true experiment in economic revitalization.

Nothing in the history of the P&I Clause or precedent bars a city from taking such creative steps to address local social or economic ills. While the Court's application of the Clause has respected the twin principles of national unity and federalism, a full inquiry into the clause's background demonstrates that the Framers of the Constitution clearly intended to strike a delicate balance in the Clause between national cohesive-

ness and preservation of the sovereignty and cultural diversity of the several states. This accommodation was reflected in the Framers' intent to include the Clause as a barrier to major threats to national unity, comparable to the military and trade disputes that plagued the nation throughout the late Eighteenth Century. (Point I).

When viewed in light of this historical framework, the Clause's inapplicability to the ordinance is obvious. Because it does not favor New Jersey residents over residents of other states, but instead merely provides a limited preference for Camden residents over all non-Camden residents, the Clause's historic concerns are not implicated.

Furthermore, the reduced opportunity of nonresidents to work on publicly funded, public works crews in Camden is simply not the type of privilege or immunity contemplated by the Clause. Indeed, the record is silent on the

effects of the ordinance on non-New Jersey residents; the vague and ill-defined impact hypothesized by appellant is radically different from the broad restrictions and disparate treatment invalidated under the Clause. Finally, the principles underlying the Commerce Clause, provide compelling support for upholding the ordinance. When a city acts in its proprietary role, it should be able to accord limited preferential treatment to its residents without being interdicted by the provisions of the P&I Clause. (Point II).

Any other result would convert the wise accommodation of the Framers, and this Court's prior decisions, into a rigid, mechanical ban. Such a cribbed interpretation of the Clause would stifle creative efforts of local governments to address the complex economic problems of unemployment and decay, blighting the urban landscape of our country.

ARGUMENT

I. THE PRIVILEGES AND IMMUNITIES CLAUSE WAS ADOPTED TO INSURE NATIONAL UNIFICATION WHILE STILL PRESERVING THE UNIQUE ATTRIBUTES OF STATE SOVEREIGNTY IN THE FEDERAL SYSTEM

A. Introduction

Appellant argues strenuously that the Privileges and Immunities Clause -- "designed as an instrument of national unification," Brief of Appellant at 16 -- applies to this case. It casts the issue as one involving a "core concern," id. at 20, which "warrants careful scrutiny under the Privileges and Immunities Clause." Id. at 25.

Appellant errs in assuming that any distinctions between the employment of residents and non-residents in publicly funded, public works projects are, ipso facto, invalid under the Clause. The full development of the relevant history shows that the Clause was drafted and included in the Constitution in response to the specific economic, social and political problems facing the colonies (and subsequently the states)

during the latter part of the Eighteenth Century. Its inclusion was designed to avoid those internecine trade, military and diplomatic disputes and wars which, potentially, could have thwarted the Framer's goals of forging one unified nation. The drafters and others integrally involved in the political process at the time knew that delegates to the Continental Congress, for instance, saw themselves as "ambassadors of twelve distinct nations," Jensen, The Articles of Confederation 56 (1948) (hereinafter Jensen I).

The Clause was meant to unify the colonies, so as to avoid the "warring duchys" problems which had traditionally plagued European empires.[4] See, e.g., Jay, "An Address to the People of the State of New York on the Subject of the

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[4] See, e.g., Jensen I, supra, at 4,6; Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 vii-viii, 422 (hereinafter Jensen II); see generally, Hutson, "Country, Court and Constitution: Antifederalists and the Historians," 38 Wm. & Mary Q. 337 (1981).

Constitution," (1787), in Ford, ed., Pamphlets on the Constitution of the United States 67, 84 (1888). It is evident, however, that the clause was historically not designed to preclude a state or municipality from taking residency into account in creatively addressing local social or economic problems.[5]

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[5] The Court has long recognized the importance of the full development of the historical background of the Constitution as a guide to its contemporary application. Indeed, on at least four occasions during the 1982 Term, the Court premised decisions largely on an historical analysis of the "concerns giving rise" to the inclusion of specific clauses in the Constitution. See, e.g., United States v. Ptasynski, -- U.S. --, 51 U.S.L.W. 4674, 4676 (June 7, 1983) (construing Uniformity Clause, Art. I, sec. 8, cl.1, and relying on 1 Story, Commentaries on the Constitution of the United States Sec. 957 (Cooley ed. 1873); Immigration and Naturalization Service v. Chadha, -- U.S. --, 51 U.S.L.W. 4907, 4915-4916 (June 21, 1983) (construing, inter alia, the Presentment Clauses, Art. I, Sec. 7, cl. 2,3, and the Bicameralism requirements, Art. I., Secs. 1, 7); Solem v. Helm, -- U.S. --, 51 U.S.L.W. 5019, 5021 (June 28, 1983) (Eighth Amendment's proportionality requirement rooted in the Magna Carta); Marsh v. Chambers, -- U.S. --, 51 U.S.L.W. 5162, 5163 (June 28, 1983)(tradition of opening legislative sessions with prayer "deeply embodied in the history and tradition of this country").

Full development of the historical patterns underlying the P&I Clause will demonstrate that this Court's application of the Clause has respected the twin purposes of national unity and federalism, even though its pertinent history has not been fully explored. While any attempt to delve more deeply into the thought processes and motivations of the Framers is fraught with peril,[6] such an effort to cast new light on the

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[6] See, e.g., Smith, The Convention and the Constitution: The Political Ideas of the Founding Fathers 22-23 (1965) (hereinafter Smith I); Brest, "The Misconceived Quest for the Original Understanding," 60 B.U.L. Rev. 204 (1980); Wofford, "The Blinding Light: The Uses of History in Constitutional Interpretation," 31 U. Chi. L. Rev. 502, 530-533 (1964) (quoting, inter alia, Mr. Justice Holmes' opinion in Missouri v. Holland, 252 U.S. 416, 433-434 (1920)); Wyzanski, "History and Law," 26 U. Chi. L. Rev. 237 (1959); Monaghan, "Our Perfect Constitution," 56 N.Y.U.L. Rev. 353 (1981); Miller, Social Change and Fundamental Law: America's Evolving Constitution, ch. 10 (1979); Sandalow, "Constitutional Interpretation," 79 Mich. L. Rev. 1033, 1039 (1981).

Of special interest is the recent Symposium, "Judicial Review and the Constitution -- the Text and Beyond," 8 U. Dayton L. Rev. 443-831 (1983).
(Footnote continued on next page)

Clause[7] is essential if we are to move beyond the few sources[8] repeatedly referred to in

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(Footnote 6 continued)
Within that volume, see especially, Leedes, "A Critique of Illegitimate Noninterpretivism," 8 U. Dayton L. Rev. 533 (1983); Miller, "Toward a Definition of 'The' Constitution," 8 U. Dayton L. Rev. 633 (1983); Saphire, "Judicial Review in the Name of the Constitution," 8 U. Dayton L. Rev. 745 (1983).

7 "Little analysis has been devoted to the role of the privileges and immunities clause in the original scheme of things." Berger, Government by Judiciary 5-6 (1977). See also, Currie, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," in Currie, ed., Selected Essays on the Conflicts of Laws 460 (clause "not among the more definitively glossed provisions of the Constitution"); Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 8 Wm. & Mary L. Rev. 1 (1967) (hereinafter Antieau)(clause "misinterpreted" and "misunderstood"). See Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 379 (1978).

8 As Wofford has noted, sole reliance on Farrand's compilation and/or on Madison's Debates "leaves a great deal to be desired," 31 U. Chi. L. Rev., supra, at 504; Wofford points out that Farrand conceded that "the Journal cannot be relied upon absolutely," id. at 505, quoting 1 Farrand, Records of the Federal Convention of 1787 xiii (1911); "What we do not have, and indeed will never have, is an external check upon either the accuracy or the
(Footnote continued on next page)

majority[9] and concurring[10] opinions, and by appellant here.[11] As has been suggested:

> History thus provides enlightment. Indeed, the Court frequently says that it reads the provisions of the Constitution "in the light" of history. The image of light suggests most clearly how history should be used. It is neither prologue on the one hand, nor director of the drama on the other; rather,

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(Footnote 8 continued)
completeness of [the] picture [of the Philadelphia proceedings]," Wofford, 31 U. Chi. L. Rev., supra, at 505-506.

Of special relevance to this case, Farrand specified that Pinckney's plan of government (presented to the Constitutional Convention on May 29, 1787) "is not among the papers of the Convention, nor has any copy of it ever been found," 1 Farrand, supra, at xxii (noting that "an outline of the plan and extracts from same...[made] it possible to present a fairly complete restoration of the original text," id. [emphasis added]). The May 29 plan, of course, is "framed exactly" on the parallel clause in the Articles. See 3 Farrand, supra, at 112; see Point IB, infra.

9 See, e.g., Austin v. New Hampshire, 420 U.S. 656, 661 (1975), referring to 3 Farrand, supra, at 112.

10 See, e.g., Zobel v. Williams, -- U.S. -- , 102 S. Ct 2309, 2322 (1982) (O'Connor, J., concurring), referring to 3 Farrand, supra, at 112.

11 See, e.g., Brief of Appellant at 18, n. 32

> history is a spotlight, always available to illuminate, but not to blind. History does not provide the answers to the problems of today; it merely helps to frame the questions.

Wofford, 31 U. Chi. L. Rev., supra, at 532-533 (footnote omitted).12

B. The Standard Historical Reasons for Inclusion of the Clause

In analyzing the P&I Clause, the Court has traditionally looked to the Clause's history to gain insight into its original meaning.[13] Thus, the Court has concluded that the Clause's purpose is to protect a set of core interests deemed necessary for national unity. A fuller inquiry into the dynamics of eighteenth century American society, see Section IC, infra, sheds further light on the Framers' intent. Specifically, a pattern of conflict between the states --

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12 Wofford was most recently cited with approval in Marsh, 51 U.S.L.W., supra, at 5165, 5171, n. 33 (Brennan, J., dissenting).

13 See, e.g., Austin, supra; Baldwin, supra; and Zobel, supra.

coupled with a desire to maintain the nation's cultural diversification -- provides the historical backdrop for the explicit guarantees in the P&I Clause.

It is not enough to say that the Clause is only an abbreviated version of its predecessor in the Articles of Confederation. See Austin, 420 U.S., supra, at 662; Zobel, 102 S. Ct., supra, at 2322-23 (O'Connor, J., concurring). In supporting this theory, the Court has consistently relied on a statement by Charles Pinckney, delegate from South Carolina and author of the Clause, that the Clause "is formed exactly upon the principles of the fourth Article of the present Confederation..." 3 Farrand, supra, at 112, as cited in Austin, 420 U.S., supra, at 662, n. 6; Zobel, 102 S. Ct., supra, at 2323 (O'Connor, J., concurring).[14]

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[14] There may be some question as to the accuracy of Pinckney's quotation. See footnote 8, supra.

The Confederation provision -- referred to by Pinckney -- included two guarantees: the first, assuring to free inhabitants "all privileges and immunities of free citizens in the several states," guaranteed basic rights common to all citizens; the second guaranteed commercial interstate equality to protect non-residents in states other than their own. See Antieau, supra; Antieau, Modern Constitutional Law 661-715 (1969). Greater weight has been given to this second guarantee by the Court as evidenced by the fact that the P&I clause has come to be read as creating "a norm of comity" defined by the extent of those rights afforded by a state to its own citizens. See Austin, 420 U.S., supra, at 1192.[15]

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[15] But see Antieau, supra, at p. 6 (arguing that the deletion at the Convention of the Articles of Confederation language concerning trade or commerce indicated that the Clause was not intended to be commercial in scope); Tribe, American Constitutional Law 36-37 and n. 80

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In addition to relying on Pinckney, the Court has supported its interpretation with a line of decisions beginning in 1869 with Paul v. Virginia, 75 U.S. 357 (1869). E.g., Zobel, 102 S. Ct., supra, at 2320, n. 7; Austin, 420 U.S., supra, at 378; Hicklin v. Orbeck, 437 U.S. 518, 522 (1978).[16] However, the Court, in its search for the historical origins of the Clause, has not examined adequately the pre-

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(Footnote 15 continued)
(Supp. 1979) (criticizing a commercial emphasis as "narrowly historicist" and not "consistent even with the breadth of the catalogue of fundamental rights" in Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823)).

[16] In Paul, Justice Field defined the privileges and immunities granted to non-state residents as those "which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." 75 U.S., supra, at 180-181.

Although the Court has generally relied on the Paul analysis, it seems to recognize that Paul represented a rejection of an earlier fundamental rights approach. See Baldwin, 436 U.S., supra, at 382, citing Hague v. CIO, 306 U.S. 624 (1938).

Paul case law and legislative histories to discern the Framers' intent. This information reveals that the underlying historical record is not as limited as has been implied.[17]

A complete review reveals that the fundamental rights guarantee -- rather than the interstate commercial guarantee of Article IV of the Articles -- was intended to be the principle governing the Clause; this purpose is even implied by Hamilton. In No. Eighty of the Federalist Papers (Bourne ed. 1942), he suggests

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[17] During this period, the dominant political philosophy was natural rights. Antieau, supra, at 4-5. According to this doctrine, government was organized to safeguard certain basic, fundamental rights possessed by any citizen. While the protection of a citizen's natural rights was assured by the political power he had within his home state, these rights were not guaranteed in a state in which he was a non-resident. Id. The P&I Clause signified a promise to protect these basic rights shared by all citizens throughout the United States, thus fostering a sense that Americans constituted one people. See Howell, The Principles and Immunities of State Citizenship 13 (1918); see also, Tribe, supra, at 412.

that the federal courts should have jurisdiction in cases concerning the violation of the P&I Clause, specifically because the rights to be protected would be the fundamental rights possessed by all United States citizens:" It may be the esteemed basis of the Union, that 'the citizens of each State shall be entitled to all...privileges and immunities of citizens of the several States.'" Id. at 114.

Hamilton's views were seemingly shared by the other delegates to the Constitutional Convention as evidenced by the minimal debate concerning the Clause's adoption.[18] In addition, early state judicial decisions construing the Clause support his interpretation. For example, in Campbell v. Morris, 3 Harrison & McHen, 535

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[18] The only reported debate on the clause was on August 28, 1787. On that date it is noted: "General Pinckney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves." 5 Elliott's Debates 487 (2d ed. 1836), cited in Antieau, supra, at 6.

(Md. Gen'l. Ct. 1797), the court held that the rights protected by the Clause are basic, fundamental rights, such as the right to property; the phrase, "in the several states" designated the kind of right to be protected, not where the rights are guaranteed.[19] Likewise, Justice Bushrod Washington, the first federal judge to interpret the P&I Clause, found that it encompassed those privileges "which are, in their very nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and soverign." Corfield, 6 Fed. Cas., supra, at 551-552. The constitutional

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19 Other early cases are in accord. See, e.g., Murray v. McCarty, 2 Munf. 373 (Va. Sup. Ct. App. 1811); Livingston v. Van Ingen, 9 Johns Cas. 507, 561 (N.Y. Ct. Err. 1812); Douglas v. Stephens, 1 Del. Ch. 465, 477 (Del. Ct. E.&A. 182).

orthodoxy of Corfield was accepted both by this Court and state tribunals prior to Paul. See Antieau, supra, at 10-15.

Further evidence that the fundamental rights interpretation was prevalent prior to Paul is found in the revealing legislative history of the Civil Rights Act and the Thirteenth and Fourteenth Amendments. The drafters of the Amendments and the Act all characterized the Clause as conferring such rights "common to men . . . which no man or state may rightfully take away."[20] These views of the leaders of Congress lead unerringly to the conclusion that the Framers intended the privileges and

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20 Cong. Globe, 35th Cong., 2d Sess., 984 (1862), cited in Antieau, supra, at 15 (statement of Rep. John A. Bingham of Ohio). See also, e.g., Cong. Globe, 39th Cong., 2d Sess. 474-475 (1866) (statement of Sen. Lyman Trumbull [P&I confers "[s]uch fundamental rights as belong to every free person"]; id. at 1757, cited in Antieau, supra, at 15-16 (Sen. Trumbull's statement seeking a congressional override of Pres. Johnson's veto of the Civil Rights bill); id.,

(Footnote continued on next page)

immunities of Articles IV to protect fundamental rights that were integral to the formation of a national union.[21]

C. Contemporaneous Reasons For Inclusion of Clause

However, in order to understand fully all of the concerns that motivated the Framers of the Clause, it is necessary to review the complete historical background of its enactment. A survey of other relevant historical sources reveals that the balance struck in the P&I Clause was far more delicate than suggested by the sources relied on by Appellant. See Brief at 18, n.

(Footnote 20 continued)
at 1115-1119, cited in Antieau, supra, at 16 (statement of Rep. James Wilson ["Before our Constitution was formed, the great fundamental rights...belonged to every person who becomes a member of our great national family. No one surrendered a jot or a tittle of these rights by consenting to the formation of the government"].

[21] According to Rep. Wilson, there would have been no need for the proposed Civil Rights Bill if the states all had been willing to honor the P&I clause. Antieau, supra, at 16.

32.[22] When read together, these sources reveal the contributions of the Anti-federalists to the entire framing process, helping to

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22 Thus, an examination will help provide the "peculiar wisdom...needed to expound the Constitution," 6 Fairman, Reconstruction and Reunion 1864-88, Part One, 1301 (1971) (emphasis omitted), so as "not merely to hold to [the] words [of the laws], but to comprehend as well their force and power," id.

The relevant literature considers the role of the Antifederalists in the drafting of both the Articles and the Constitution, see, e.g., Main, The Antifederalists: Critics of the Constitution, 1781-1788 (1961); Kenyon, ed., The Antifederalists (1966); Wood, ed., The Confederation and the Constitution: The Critical Issues (1973), and gives a sense of the many differing and overlapping ways the political forces of the time can be characterized, see, e.g., Main, supra, at 280; Wood, "The Worthy Against the Licentious," in Wood, supra, at 86, 94; Wolfe, "On Understanding the Constitutional Convention of 1787," 39 J. Politics 97, 112 (1977); Hutson, 8 Wm. & Mary Q., supra, at 356 (relying on terminology developed in Zagorin, The Court and the Country: The Beginning of the English Revolution 33-38 (1969)); see also, Kenyon, supra, at xcvii; Thomas, "The Virginia Convention of 1788: A Criticism of Beard's An Economic Interpretation of the Constitution;" 19 J. Southern Hist. 63 (1953). It also paints a more complete picture of socioeconomic conditions affecting the key question of interstate relationships prior to the

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clarify the "concerns giving rise" to the inclusion of the P&I Clause.[23]

There can be little question that the P&I Clause was adopted "primarily as an instrument of national unification." Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487, 517 (1981) (hereinafter Varat). The intensity of the divisiveness which plagued the colonies prior to union was so extensive that John Adams could refer to Massachusetts as "our country" and to its delegation in the Continental Congress as "our embassy." Jensen I, supra, at 163-164, citing 1 Burnett, ed., Letters of

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(Footnote 22 continued)
drafting of the Articles. See, e.g., Rogers, "Municipal Corporations," in Yale Law School Faculty, eds., Two Centuries Growth of American Law, 1701-1901 203 (1902); Schlesinger, The Colonial Merchants and the American Revolution, 1763-1776 (1918); see also sources cited in Jensen I, supra, at 7-8, n. 13.

[23] As indicated above, this Court has again recently endorsed the practice of integrating pre-constitutional sources into its opinions. See Solem, 51 U.S.L.W., supra, at 5021-5022.

Members of the Continental Congress 35, n. 4 (1921).

What must be explored, however, is the nature of the divisiveness, for this explains what national unity concerns were behind the Clause's enactment. The Framers -- both Federalists and Antifederalists alike -- understood European political history, and were familiar with problems faced by confederacies as ancient as Macedonia.[24] See, e.g., Federalist No. 80, ("[h]istory['s]...horrid picture of the dissensions and private wars which distracted and desolated Germany...towards the close of the

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[24] See, e.g., Riley, "Martin Diamond's View of The Federalist," Publius: J. Federalism, Vol. 8, No. 2 (Summer 1978), at 71, 81; see also, Jensen I, supra, at 142 (blaming failure of the Dutch Republic on policy of one-state one-vote); Winthrop, "The Letters of 'Agrippa,'" in Kenyon, supra, at 131, 142 (hereinafter "Winthrop") (state surrender of "unlimited right to regulate trade would drain ...[the extremes of the empire..., like Ireland and Scotland]").

15th century, supra, at 113).[25] See Rawles, A View of the Constitution of the United States of America 83-85 (1825); 2 Kent, Commentaries 84-85, n.b (12th ed. 1973); Miller, 8 U. Dayton L. Rev., supra, at 696.

This awareness naturally led to a concern that the colonies (subsequently, the states) could not afford to become "warring duchys," dissipating time, energy, resources and lives on internal trade and military wars. For these fears did, indeed, appear to be warranted; the states needed to "be restrained from making angry, oppressive, and destructive laws, from declaring ruinous wars with their neighbors, from fomenting quarrels and controversies." Webster, "The Weakness of Brutus Exposed," in Ford, supra, at 117, 128.

There was the fear of actual military warfare, that the militia of one state might attack

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[25] For a sense of Hamilton's full historical scope in this regard, see 3 Farrand, supra, at 307-308.

another "with hostile fury," Smith, "An Address to the People of the State of New York," in Ford, supra, at 96. A "general government" was seen as necessary "to protect each State against domestic as well as external violence," Randolph, "Letter on the Federal Constitution," in Ford, supra, at 259, 267.[26]

As the colonies developed different, contradictory, foreign trade policies, see, Davis, supra, at 98-101; Jensen II, supra, at 297-301; Schlesinger, supra, at 529-535, the question of whether Congress or the states should have the power to regulate trade and levy tariffs emerged, Jensen II, supra, at

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[26] This fear was not apocrophal. Settlers in Pennsylvania and Connecticut fought "violently" over the Wyoming Valley [in Northeastern Pennsylvania] area, while there was "open conflict" between Virginians and Pennsylvanians over the latter state's western boundaries. See Jensen II, supra, at 330; see also, Davis, Sectionalism in American Politics, 1774-1787 11 (1977).

287.[27]

But finally, the question of enactment of interstate trade barriers raised the most pressing and persistent concerns as to the future of the union.[28] Thus, even before the Revolution, New Jersey and Connecticut "levied higher duties on goods brought in from neighboring colonies in an [unsuccessful] effort to build up local commerce," Jensen II, supra, at 338; see also, Schlesinger, supra, at 152.[29] New Jersey citizens,

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[27] See, e.g., Davis, supra, at 100; Jensen II, supra, at 292-293; see generally, McCormick, Experiment in Independence: New Jersey in the Critical Period, 1781-1780 (1950).

[28] The standard account of the period for instance, refers to Madison's efforts to restrict Virginia commerce to certain ports so merchants could get their goods to market "without interference from the Baltimore merchants," Davis, supra, at 112, and the attempts by other Virginians to have Annapolis, Maryland, rejected as a capital site for fear that that "would increase Baltimore's commercial influence," id. See also, id. at 65-69.

[29] For other similar actions by other colonies, see, e.g., id., at 195, 530-533.

Professor McCormick explains, "were naturally resentful about contributing to the support of the neighboring governments," supra, at 108;[30] soon after New Jersey's legislature declared all state ports "open" in 1783, merchants complained bitterly "about the drain of currency to New York and Philadelphia," id. at 112.[31]

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30 New Jersey -- interestingly and ironically -- probably bore the brunt of the worst of the "mass of state legislation which hampered and restricted the free flow of commerce throughout the country." Murphy, The Triumph of Nationalism: State Sovereignity, the Founding Fathers, and the Making of the Constitution, 39 (1967). Murphy quotes James Madison: "New Jersey placed between Philadelphia and New York, was likened to a cask tapped at both ends." Id.

31 When the New Jersey legislature held a special session in 1784 -- to meet with representative town merchants -- it received a petition endowed with "the most ample immunities and privileges that may be useful for their own internal order and regulation." Id. at 117, quoting the petition of deputies as reported in the New Jersey Gazette, November 22, 1784 (emphasis added). This policy, McCormick reports, particularly "irritated" New York, id. at 120, which responded by exacting discriminatory clearance fees from boats traveling to and from New Jersey, id. at 120-121; New Jersey's response was to im-

It has thus been suggested that, by 1786, the nation was "sectionally rent," Davis, supra, at 108, over the states' inability to harmoniously solve commercial disputes which "raised questions about the very foundation of the Union," id. at 105. Although the fears of some "that large states would swallow up their neighbors," Jensen II, supra, at 337, proved unfounded, sectional divisiveness "remained troublesome throughout the revolutionary era, slowing the progress of the Articles of Confederation in Congress, stalling their ratification... causing major clashes in

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(footnote 31 continued)

pose a tax on the lighthouse New York erected on Sandy Hook, id. at 121, citing Session Laws 112 (June 7, 1787). Notes McCormick:

> It is surprising that the diverse policies pursued by New York and New Jersey did not result in a more serious clash than that represented by the petty lighthouse tax. Id.

Congress...and in the Philadelphia Convention," Davis, supra, at 13.

The records indicates, then, that these were the true contemporary concerns of the Framers in their search for a "norm of comity," Austin, 420 U.S., supra, at 660: the avoidance of civil trade wars[32] and civil military wars among a group of fiercely independent colonies, divided deeply by sectional self-interest and bias, a separatism "not only legal but,...more important, psychological as well." Jensen I, supra, at 117. The Clause was designed to serve as the "instrument of national unification," Varat, supra, at 517, by breaking down boundaries of legal and psychological separatism which had plagued a nation seen as "a union without bounds of union, like a cask without hoops," Davis, supra, at 148, quoting

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32 See Varat, 48 U. Chi. L. Rev., supra, at 488, n. 4.

Webster, A Dissertation on the Political Union and Constitution of the Thirteen United States 3 (1983).

D. The Complete Historical Record Reveals That The Clause Was The Product of A Delicate Accommodation Between The Proponents of State Sovereignty and National Unity

This backdrop helps put the critical question in a clearer perspective: how could the Articles -- and, eventually, the Constitution -- avoid the perpetuation of such strife, in light of the remarkable cultural diversity of the colonies, and the concomitant fear on the part of many of a consolidated government?

For there can be little question that the colonists treasured their diversity. As the "Agrippa" letters noted pithily, "It is impossible for one code of laws to suit Georgia and Massachusetts," Winthrop, supra, at 133, and, as Adams pointed out, "Philadelphia, with all of its and wealth and regularity, is not Boston."

Jensen I, supra, at 118, quoting 2 Adams, ed., The Works of John Adams, 393 (1850).[33]

This diversity led ineluctably to apprehensiveness as to consolidation. Although the 1787 view of Thomas Wait--"The vast Continent of America cannot be long subjected to a Democracy into one Government; you might as well attempt to rule Hell by Prayer," Main, supra, at 129, citing "Letter to George Thatcher," 16 Hist. Mag. 258 (1869)--might be seen as extreme, the fear of the "Aristocratical Saddle," Main, supra, at 132, with "boundless" authority, Kenyon, supra, at xliv, was real.[34]

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[33] "The Antifederalists were saying, whether they realized it or not, that the people of America even in their several states were not homogeneous entities each with a basis similarity of interest for which an empathic elite could speak," Wood, supra, in Wood, supra, at 97. Jensen has characterized "the states' independence of one another" as "the greatest obstacle to a union of almost any kind," Jensen 1, supra, at 116.

[34] Kenyon is clear on this point:
[Footnote continued on next page]

However, since almost from ratification "the Confederation was being battered by the almost uncontrollable forces of interstate and especially intersectional conflict," Davis, supra,

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(Footnote 34 continued)

> [The] fundamental principle [of the Antifederalists] was the belief that republican government could not be extended over a large geographical area with a numerous and heterogeneous population...The American people were too diverse in these respects to operate and be subject to a single, national, and to use their favorite term, consolidated government.

Supra, at cvi-cvii (emphasis in original).

It is thus not surprising that Richard Henry Lee, on behalf of the Continental Congress, circulated a letter to the states along with the Articles of Confederation, seeking dispassionate review of the Articles "under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities... differing in habits, produce, commerce and internal policy... under a conviction of the absolute necessity of uniting all our councils and all our strength, to maintain and defend our common liberties." Burnett, The Continental Congress 255-256 (1941).

at 58; see e.g., Ferguson, "The Nationalists of 1781-1783 and the Economic Interpretation of the Constitution," in Wood, ed., supra, at 1, 5-6, it became even more essential that a Constitution suitable for governing a "disharmonious society" be crafted, Smith I, supra, at 26.[35] Such a Constitution was drafted, "embod[ying] at least a general consensus of seminal political values and attract[ing] widespread endorsement and consent." Saphire, 8 U. Dayton

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35 It has thus been suggested that a major key to the Constitution's longterm success was its "initial acceptance by both Federalists and Anti-federalists." Boyd, The Politics of Opposition: Antifederalists and the Acceptance of the Constitution, xi (1979). This acquiescence by the Antifederalists was crucial; "it implied that men like Richard Henry Lee...., although opposed to the Constitution, were willing to operate within the framework of the Constitution," id. at 19, thus paving the way towards a meaningful political consensus.

L. Rev., supra, at 790.[36]

The unique role of the P&I clause as the promoter of national unity can then be seen through this historical filter: in attempting to draft a document which would appeal to (or at least be accepted by) Federalists and Antifederalists alike, the Framers had to "walk a tightrope" between the needs of a strong union and the fears that consolidation would be the first step towards destruction of the nation's cultural diversity. The problems which bedeviled the Confederation -- civil strife, trade wars, inconsistent dealings with foreign powers -- needed to be dealt with in a way which would thus promote unity without impairing the vitality of the "continuation

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[36] See also, Brest, 60 B.U.L. Rev., supra, at 234; Roche, "What Was the Relation of the Constitution to Democracy? The Founding Fathers: A Reform Caucus in Action," in Wood, supra, at 113, 136.

of state government." Varat, supra, at 517.[37]

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37 "Fulfillment of the fundamental obligation of state government -- to care for the state's own residents -- depends, to some ill-defined degree, on the ability to withhold from others what a state chooses to provide its own." Id. at 490. Cf. Reeves, Inc. v. Stake, 447 U.S. 429, 442 (1980) (restrictions on the enjoyment of numerous state services to state residents is consistent with an "essential and patently unobjectionable purpose of state government"). The fact that the Framers retained the concept of state government -- making "some basic assumptions about the nature of state communities and the scope of state powers and functions ... compel[s] recognition of some state power to deviate from the apparently flat prohibition against state discrimination on the basis of residence." Varat, supra, at 520. See also, Currie, supra, at 446 (differential treatment essential "if laws are to be rationally administered").

II. THE PRIVILEGES AND IMMUNITIES CLAUSE IS NOT A BAR TO A CITY ORDINANCE THAT ACCORDS A LIMITED PREFERENCE TO ITS OWN RESIDENTS IN PUBLICLY FUNDED, PUBLIC WORKS PROJECTS FOR OR ON BEHALF OF THE CITY

The historical background of the P&I Clause documented in Point I[38] informs an analysis of the constitutional validity of the Camden ordinance in the present case. When viewed against this historical backdrop, it is evident that the concerns underlying the Framers' inclusion of the Clause in the Constitution are simply not implicated by a narrowly

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38 As in Marsh v. Chambers, supra, the historical evidence is extremely illuminating in assessing a matter of contemporary concern:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment clause to mean, but also on how they thought that Clause applied to the practice authorized by by the First Congress -- their actions reveal their intent. Id., 51 U.S.L.W. at 5164.

drawn municipal ordinance which (1) sets aside 40% of public works jobs for residents of Camden, an economically depressed city; and (2) reserves 60% of all such jobs for nonCamden residents, both within and outside of the State of New Jersey, to be filled in a wholly nondiscriminatory fashion.

A. The Privileges and Immunities Clause Does Not Apply To A Local Ordinance That Favors City Residents OverIn State and OutOfState NonResidents

As Point I establishes, the Clause was drafted "to help fuse into one Nation a collection of independent sovereign States," Toomer v. Witsell, 385, 395, 334 U.S. (1948). To achieve this goal the Framers placed nonresidents "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned ...[and]... relieve[d] [nonresidents] from the disabilities of alienage in other States." Paul, 75 U.S., supra, at 360; see

Blake v. McClung, 172 U.S. 239, 256 (1898).[39]

Viewed in light of these purposes, it is clear that the Clause is not applicable to a city's ordinance that favors its own residents over non-residents in the rest of the country, both in-state and out-of-state. First, the ordinance does not discriminate against out-of-state residents. With respect to the availability

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[39] Paul was explicit in stating that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens." Paul, 75 U.S., supra, at 360 (emphasis added). More recently, the Court has explained that the Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer, 334 U.S., supra, at 395.

See also Ely, Democracy and Distrust: A Theory of Judicial Review 23 (1980)(Article IV, Section 2 "was an equality provision intended to keep states from treating outsiders worse than their own citizens"), and id. at 83 (clause "was intended and has been interpreted to mean that state legislatures cannot by their various regulations treat out-of-staters less favorably than they treat locals").

of those public works jobs in Camden covered by the ordinance, non-New Jersey residents are upon precisely "the same footing" as non-Camden, New Jersey residents. New Jersey has certainly not granted any advantages in its Constitution or laws to its state residents in securing public works jobs in Camden. To the contrary, New Jersey residents who do not reside in Camden suffer from the same disadvantages as construction workers from any other state. Therefore, any "disabilities of alienage" are shared by all non-Camden residents[40]. Consequently, this is not a

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40 The Supreme Court of New Jersey conjectured that the Camden ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents." United Bldg. and Constr. Trade Council v. Camden, 88 N.J., supra, at 341, 443 A.2d at 160. Although the record is silent on this assertion, this is beside the point; in the absence of any record on impact, see infra at pp 50-52, the only pertinent inquiry in assessing the facial validity of the ordinance is whether it affects both New Jersey residents not living in Camden and out-of-state residents.

situation within the scope of the P&I Clause, for the Camden ordinance does not affect "the States...treatment of each other's residents." Hicklin, 437 U.S., supra, at 523.[41]

Not only history and precedent, but the wisdom of the Framers, supports this interpretation. The drafters recognized "non-residents are a paradigmatically powerless class politically." Ely, Democracy and Distrust, supra, at 83. Cf. Austin, 420 U.S., supra, at 662-63. By focusing on discrimination against non-residents and ensuring that their interests are linked to those

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41 There may be situations, of course, where a city's action favoring local residents may have the effect of, or even be a subterfuge for, furthering a statewide policy of discrimination against out-of-state residents. Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951). There is no suggestion in the present record that the City of Camden, or the State of New Jersey, is seeking to implement such a policy; without a fully-developed record, such a hypothetical possibility, see Brief of Appellant at 29-30, does not warrant application of the P&I Clause.

of residents possessing political power, there was a self-perpetuating Constitutional guarantee adequately protecting non-residents' interests. Id.

But this purpose is no longer appropriate if the effect of Camden's ordinance favoring its residents is to treat non-Camden, New Jersey residents in the same manner as non-New Jersey residents. In this situation, the interests of out-of-state residents can be fully vindicated without resort to the Clause, since, presumably, the affected non-Camden state residents could take appropriate political action to repeal or limit the ordinance.

If anything, tearing the Clause from its historic roots, and employing it as a bar to innovative local efforts, could lead to results fundamentally at odds with the Framers' efforts to preserve a dynamic federal scheme of government. Cf. New State Ice Co. v. Liebmann, 285 U.S., 262, 311 (1932) (Brandeis, J., dissenting).

See also, Chandler v. Florida, 449 U.S. 560, 579-80 (1981). Municipalities would be unable to experiment with creative programs favoring residents so as to combat unemployment or foster economic revitilization. Surely, the Framers did not intend to create a rigid constitutional straightjacket that would "threaten the future fashioning of effective and creative problems for solving local problems and distributing government largesse." Reeves, Inc., 447 U.S., supra, at 429. As the New Jersey Supreme Court aptly observed: "It is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their social ills." United Bldg. and Constr. Trades Council, 88 N.J., supra, at 340, 443 A.2d at 159.

B. The Reduced Opportunity To Work On A Publicly Funded, Public Works Crew Is Not A Privilege Or Immunity Protected By Article IV, Sec. 2

There is no intimation in the history or application of the Clause that all distinctions between residents and non-residents are invalid. Baldwin, 436 U.S., supra, at 383. The Clause was designed to remove from non-residents "the disabilities of alienage," Paul, 75 U.S., supra, at 360, not to deprive a state resident of any benefits that may accrue from residency in the particular state. "Some distinctions... merely reflect the fact that this is a Nation composed of individual States, and are permitted; other[s]...are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." Baldwin, 436 U.S., supra, at 383.

Appellant suggests that nonresidents of New Jersey are deprived of a fundamental privilege or immunity protected by the Clause because Camden's ordinance excludes them from seeking access to private employment opportunities in Camden. Brief of Appellant at 20-25; the record does not

support this reading. First, the unions constituting the United Building and Construction Trades Council of Camden County and Vicinity (Council) include an undefined number or percentage of "persons who reside in the City of Camden, persons who reside in New Jersey but outside the City of Camden and persons who reside outside the State of New Jersey." Id. at 45. However, there is no indication in the record that the 60% set-aside for nonresidents of Camden is insufficient to accommodate the employment needs of any non-New Jersey residents in Camden public works construction crews. Nor is there any indication of the extent to which the Council's employees in the building and construction trades, many of whom "perform extremely specialized tasks," id. at 5, will be, or have been, adversely affected by the provisions of the ordinance, which only require that 40% of "the entire labor force" be residents of the City of Camden, id. at 2

(emphasis added). Indeed, the impact of the Camden ordinance upon nonresidents is even more speculative than in White, 103 S.Ct., supra, at 1045, n. 6, where at least the parties had "stipulated that some out-of-state workers who would otherwise have been employed on the projects would be unemployed."

Second, the record "does not show that the increased employment of city residents in publicly funded construction projects has been accompanied by a decline in the percentage of out-of-state residents." Id. Therefore, appellant has not demonstrated in the present record that out-of-state residents would necessarily, or even likely, be deprived of the opportunity to participate in the 60% component of the public works construction crews that contains non-residents of Camden.

When stripped of its rhetorical gloss, appellant's attack is solely on the facial validity of a city ordinance that sets aside 40% of local,

publicly funded, public works consturction jobs for city residents. In effect, appellant seeks a determination that, even though out-of-state residents can qualify for, or fill, 60% of jobs on any project covered by the ordinance, their undefined, and perhaps nonexistent, reduced opportunity to work on these crews denies a fundamental "privilege" or "immunity" protected by Article IV, Sec. 2. This expansive construction of the Clause is neither supported by its history nor by this Court's prior decisions.

First, non-residents of New Jersey are not being saddled with a discriminatory restriction favoring New Jersey residents. Instead, non-Camden New Jersey residents also have a reduced opportunity to work on Camden work crews. There is thus no basis for assuming that the opportunity afforded Camden residents by its municipal ordinance is a fundamental "privilege" or "immunity" of New Jersey state citizenship.

Second, while this Court has repeatedly recognized that the Clause protects the State's regulation of the private marketplace, Hicklin, supra; Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer, supra, these decisions do not support the conclusion that employment in public works construction projects funded by public funds is equally fundamental. Indeed, the special nature of the state's public role in these circumstances militates against treating this as another species of regulation over private employment. Here, the city is allowing limited preferential treatment for its residents as an incident to the exercise of a proprietary interest in construction projects to be performed for or on behalf of the City. Cf. Hicklin, 437 U.S., supra, at 529. In this role, Camden, like private individuals and businesses, retains flexible authority "to produce its own supplies, to determine those which whom it will deal, and to fix the terms and conditions upon

which it will make needed purchases." Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). Cf. Doe v. Bolton, 410 U.S. 179, 200 (1973) (dictum) (abortion residency requirement "not based on any policy of preserving state-supported facilities for [state] residents").

The Clause was designed to prevent discriminatory treatment towards non-residents in the regulation of private employment; however, it was never intended, and is ill-suited, to serve as a rigorous limitation on any distinctions between non-residents and residents when a state or municipality is functioning in a proprietary role. In the same manner that the State or city may give residents preferred access to its publicly owned natural resources without offending the P&I Clause, Baldwin, 436 U.S., supra, at 385-86, it may provide a preferential bias for its residents in actions undertaken with public

funds for or on behalf of the state or city.[42]

Finally, the ordinance's imprecise effect on a non-resident's opportunity for employment is very different from the broad restrictions and disparate treatment previously condemned by this Court. See e.g., Hicklin, Toomer. In Hicklin, for example, Alaska law had established a preference for state residents in every area of private employment linked, however remotely, to the development of the State's oil and gas reserves. 437 U.S. at 530-533. This absolute, virtually limitless, preference for the residents of Alaska patently disfavored any non-resident who entered the State to work, automatically relegating the

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42 Cf. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (New York statute limiting employment "in the construction of public works" to United States citizens upheld against broad constitutional challenges, including attack under Art. IV, Sec. 2, because State was acting in proprietary capacity). But see, Hicklin, 437 U.S., supra, at 531, n. 15.

latter to a secondary position as job-seeker merely by virtue of his or her non-resident status. The disadvantages to the non-resident were obvious, immediate and considerable.

In contrast, where public funds are expended in construction projects for or on behalf of the city, Camden's ordinance limits less than half of the jobs on a limited number of work crews to its residents as a means of reducing unemployment and stimulating local economic revitilization. Clearly, the carefully circumscribed ordinance "does not represent the sort of 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents'" White, 103 S.Ct., supra, at 1046 (quoting Hicklin, supra).

Finally, Camden is still allowing non-residents access to 60% of the employment on these work

crews. The vague and limited impact upon non-residents from the preference accorded residents in Camden in 40% of the jobs is different in both quantity and quality from the breadth of the discrimination towards, and total exclusion of, nonresidents invalidated in prior cases. Hicklin; Toomer, supra. In sum, appellant's interest in an increased opportunity for employment on public work crews, at the expense of Camden's efforts to combat unemployment and stimulate the city's economy, "simply does not fall within the purview of the... Clause." Baldwin, 436 U.S., supra, at 388.

C. This Court's Interpretation of The Commerce Clause Provides Persuasive Support For Upholding The Validity of The Camden Ordinance

There is a close relationship between the purpose of the P&I and the Commerce Clauses, "stem[ming] from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." Hicklin,

437 U.S., supra, at 531-32. In light of their identical roots and historical design, it is no accident that the development of the interstate privileges and immunities provision has followed a "course closely parallel to that of the Commerce Clause." Tribe, supra, at §632. As a result of the "mutually reenforcing relationship" between the two Clauses, Hicklin, 437 U.S., supra, at 531, this Court has frequently sought guidance for the interpretation of the former constitutional provision in decisions interpreting the latter, and vice versa. See, e.g., Baldwin, 436 U.S., supra, at 38586 (P&I Clause); White, 103 S.Ct., supra, at 1046 (Commerce Clause).

Under the Commerce Clause cases, a state is immune from its constraints when it acts as a market participant, rather than as a market regulator. Reeves Inc., 447 U.S., supra, at 436. See also, Hughes, 426 U.S., supra, at 809-810; White, 103 S.Ct., supra, at 1044. This

immunity is predicated on several factors. First, the historical origins of the Commerce Clause provide "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, Inc., 447 U.S., supra, at 437. Second, the immunity is supported by the "vision of federalism," Hicklin, 437 U.S., supra, at 532, and "considerations of state sovereignty," Reeves, Inc., 447 U.S., supra, 438, that underlie the Commerce Clause. Third, "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." Reeves, Inc., 447 U.S., supra, at 439. These reasons readily explain why the Court has upheld a city's ability under the Commerce Clause to favor residents when the city is expending public funds "in entering into construction contracts for public projects." White, 103 S.Ct., supra, at 1048.

These reasons provide an equally compelling basis for upholding the preferential treatment accorded Camden residents under the P&I Clause. Both the historical record and fundamental notions of federalism support the ability of a city under this Clause to exercise a limited bias in favor of its own residents when entering into contracts for publicly-funded construction projects for or on behalf of the city. Furthermore, the complex nature of urban renewal and economic revitilization require more than the appellant's simplistic use of the Clause as a bar to all resident preferences in hiring for public works construction projects. Appellant's interpretation would convert a constitutional shield for nonresidents into a bludgeon that stifles local initiatives in combatting contemporary urban problems. Even more seriously, it would ignore this Court's mandate that the Clause should always be construed with "due regard for the principle that the states should have

considerable leeway in analyzing local events and in prescribing appropriate cures." Toomer, 334 U.S. supra, at 396.

CONCLUSION

The drafters of the Privileges and Immunities Clause fully intended to mold the separate colonies into a national union; however, the historical record also reveals that they wished to preserve the vitality of the sovereign states in a federal system. Therefore, it defies reason and the historical design of the clause to assume, as appellant does, that the Framers in one brief sentence sought to divest the states of one of their unique attributes in a federal system -- the ability to favor residents in the formulation of innovative solutions to social and economic ills. Nothing in the Clause precludes a city, in its efforts to combat urban decay, from according limited preferential treatment to its own residents

in publicly-financed, public construction contracts performed for or on behalf of the city. To suggest that the ordinance is barred by the P&I Clause attributes a narrowness of vision to the Framers belied by history and this Court's precedents. The judgment of the Supreme Court of New Jersey fully accords with the intent of the Framers and prior decisions of this Court; it should therefore be affirmed.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Advocate

R. WILLIAM POTTER
Assistant Public Advocate

By: _____

MICHAEL L. PERLIN*
Special Counsel to the
Public Advocate

RICHARD E. SHAPIRO
Director, Division of Publi
Interest Advocacy

SUZAN R. SHAPIRO
ANN C. SWEENEY
Legal Interns

*Counsel of Record

No. 81-2110-ASX
Status: GRANTED

Title: United Building and Construction Trades Council of Camden County and Vicinity, Appellant
v.
Mayor and Council of the City of Camden, et al.

Docketed:
May 12, 1982

Court: Supreme Court of New Jersey

Counsel for appellant: Kudatzky, Steven K.

Counsel for appellee: Foster, N. Thomas, Yannotti, Joseph L.

Entry	Date	Note	Proceedings and Orders
1	May 12 1982	G	Statement as to jurisdiction filed.
2	Apr 23 1982		Application for leave to file jurisdictional statement in excess of page limitations and order granting same by
3	Apr 23 1982		Brennan, J., April 30, 1982. Not to exceed 48 pages.
5	Jun 1 1982		Order extending time to file response to jurisdictional statement until July 9, 1982.
6	May 28 1982		Application for leave to file a motion to dismiss or affirm in excess of page limitations, and order granting
7	May 28 1982		same by Brennan J., 6/1/82, not to exceed 35 pages.
9	Jun 3 1982		Order extending time to file response to jurisdictional statement until July 9, 1982.
10	Jul 8 1982		Motion of appellee State of New Jersey to dismiss filed.
11	Jul 14 1982		DISTRIBUTED. September 27, 1982
12	Sep 22 1982	X	Reply brief of appellant United Bldg. & Constr. Trades filed.
13	Mar 4 1983		DISTRIBUTED. March 2, 1982
14	Mar 7 1983		PROBABLE JURISDICTION NOTED.
			**********
15	Mar 21 1983	G	Motion of appellant to dispense with printing the joint appendix filed.
17	Mar 23 1983		Order extending time to file brief of appellant on the merits until May 26, 1983.
18	Mar 29 1983		DISTRIBUTED. April 1, 1983. (Motion to dispense with the printing the joint appendix.)
19	Apr 4 1983		Motion of appellant to dispense with printing the joint appendix GRANTED.
20	May 13 1983		Record filed.
21	May 16 1983		Application for leave to exceed page limits on appellant's brief on the merits filed with WJB (A-934).
22	May 16 1983		Order granting same not to exceed 64 pages by Brennan, J. on 5/17/83.
24	May 23 1983		Order extending time to file brief of appellee on the merits until July 26, 1983.
25	May 26 1983		Brief of appellant filed.
27	May 28 1983	G	Motion of New England Legal Foundation for leave to file a brief as amicus curiae filed.
28	Jun 13 1983		Motion of New England Legal Foundation for leave to file a brief as amicus curiae GRANTED.
29	Jul 26 1983		Brief of appellees Mayor & Council of Camden filed.
30	Jul 27 1983		Brief of appellee State of New Jersey Department of Treasury

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Entry	Date	Note	Proceedings and Orders
			filed.
31	Jul 28 1983		Brief amicus curiae of The New Jersey Dept. of the Public Advocate filed.
32	Aug 2 1983		CIRCULATED.
33	Oct 24 1983		SET FOR ARGUMENT. Monday, November 28, 1983. (2nd case) (1 hour)
34	Oct 27 1983		Application for leave to exceed the page limits on reply brief on the merits filed with WJB (A-306).
35	Oct 28 1983		Order granting same not to exceed 59 pages by Brennan, J.
36	Nov 18 1983	X	Reply brief of appellant United Bldg. & Constr. Trades filed.
37	Nov 28 1983		ARGUED.